UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555 (JMP)

- x

In the Matter of:

LEHMAN BROTHERS HOLDINGS, INC., et al.,

Debtors.

- x

CASE NO.: 08-01420 (JMP)(SIPA)

In the Matter of:

LEHMAN BROTHERS, INC.,

Debtor.

- x

United States Bankruptcy Court

One Bowling Green

New York, New York

December 18, 2013

10:02 a.m.

B E F O R E :

HON JAMES M. PECK

U.S. BANKRUPTCY JUDGE

Motion of Black Diamond Offshore, Ltd. and Double Black Diamond Offshore, Ltd. for Leave to Conduct Limited Rule 2004 Discovery of Debtors and Certain Former Employees [ECF No. 41112]

Lehman Brothers Holdings, Inc. v. Dr. HC Tschira Beteiligungs GmbH & Co KG, et al. [Adversary Proceeding No. 13-01431] Motion to Dismiss Adversary Proceeding

Motion of Fidelity National Title Insurance Company to Compel Compliance with Requirements of Title Insurance Policies [ECF No. 11513]

Motion of Monti Family Holding Company, Ltd for Leave to Conduct Rule 2004 Discovery of Debtor Lehman Brothers Holdings, Inc. and Other Entities [ECF No. 16803]

Motion of Giants Stadium, LLC for Leave to Conduct Discovery of LBI Pursuant to Federal rule of Bankruptcy Procedure 2004 [ECF No. 36874]

Motion of Giants Stadium, LLC for Authorization to Issue Third-Party Deposition Subpoenas Under Federal Rule of Bankruptcy Procedure 2004 and 9016 [ECF No. 39898]

Lehman Brothers Holdings, Inc., et al. v. Giants Stadium, LLC [Adversary Proceeding No. 13-01554] Pre-Trial Conference

Motion of FirstBank Puerto Rico for (1) Reconsideration, Pursuant to Section 502(j) of the Bankruptcy Code and Bankruptcy Rule 9024, of the SIPA Trustee's Denial of FirstBank's Customer Claim, and (2) Limited Intervention, Pursuant to Bankruptcy Rule 7024 and Local Bankruptcy Rule 9014-1, in the Contested Matter Concerning the Trustee's Determination of Certain Claims of Lehman Brothers Holdings, Inc. and Certain of Its Affiliates [LBI ECF No. 5197]

Motion to Lift Stay of Yuri and Irene Belik [ECF No. 39585]

Motion Pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure and Section 105(a) of the Bankruptcy Code for Approval of (I) Partial Settlement Agreements Relating to Certain Credit Default Swap Agreements and Indentures and (II) Amendment to Partial Settlement Agreement Relating to Pebble Creek LCDO 2007-3 Credit Default Swap Agreement and Indenture [ECF No. 40573]

Transcribed by: Sherri L. Breach, CERT*D-397

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P R O C E E D I N G S

THE COURT: Be seated. Good morning.

MR. FAIL: Good morning, Your Honor. Garrett Fail of Weil, Gotshal & Manges for Lehman Brothers Holdings, Inc. --

THE COURT: Good morning.

MR. FAIL: -- as plan administrator in these cases. There are two items on the agenda this morning, one in the main case and one in the adversary. Taking them in the order that they appear on the agenda, I would turn the lectern over to Ms. Somers, the movant for Black Diamond in the main case.

THE COURT: Okay.

MR. FAIL: Thanks.

MS. SOMERS: Good morning, Your Honor. Angela Somers from Reid, Collins & Tsai on behalf of Black Diamond Offshore, Ltd. and Double Black Diamond Offshore, Ltd.

These are creditors in the --

THE COURT: Is Double Black Diamond a more challenging fund than --

(Laughter)

THE COURT: -- single Black Diamond?

MS. SOMERS: I'm not sure, but it certainly is a zippier name.

Your Honor, these are creditors in the Lehman case

like many, many other creditors. And the main issue here is, as with many creditors, the guarantee of the holding company.

Pursuant to Rule 2004, Black Diamond and Double Black Diamond made two requests: One for -- it was for document discovery and the second was for examination of persons including Cara Rappaport (ph) who we have not received an objection from and an employee with knowledge of Lehman.

THE COURT: Before we get into this --

MS. SOMERS: Yes.

THE COURT: -- why is this appropriate at all?

MS. SOMERS: Well --

THE COURT: Why is this appropriate and why is this needed? And in terms of timing it seems not to be ripe.

MS. SOMERS: Your Honor, we would just like to explain to you some of the things that we have done.

THE COURT: Right.

MS. SOMERS: We're being called a squeaky wheel and, in fact, we're anything but a squeaky wheel. We're a very patient, cooperative and quiet wheel. We were served with two document requests: One was in early 2013. We produced 711 pages of documents. We were served with a second document request in July of this year, largely

duplicative of the first one. We explained to Lehman, you're asking us for the same documents. Then we produced another 44 documents. Lehman also served us with interrogatories and we answered those questions. They've asked us to produce individuals for depositions with eight topics to be covered.

We have tried to do everything we can to cooperate, to get to the bottom of what is really not this all-encompassing issue. It's a guarantee. We have emails that seem to indicate it exists. That's the main issue we're trying to get to the bottom of.

THE COURT: Well, what's the main issue?

MS. SOMERS: Whether the -- whether Lehman has a guarantee or has documents that show that the guarantee exists because our documents show that although we do not have the guarantee.

So that's really all we're trying to do here. We've tried to call and work it out and say, listen, we're not asking for the moon here. We haven't violated -- we understand the dynamics of the case. It's a massive case. There are thousands of claims. We get that. We understand that we didn't technically violate anything, and we understand that the debtor is trying to keep this under control. But the balance can't be this severe. It can't be us constantly jumping through hoops with Lehman unable to

answer any questions.

And I would just like to tell you a few of the questions I asked them. I said, do you have a road map for anything that's going to happen between now and 2015? No. I have no road map; can you tell us of any actions you need to take before you can -- no, we cannot tell you; can you make any commitments that you'll try to do anything for us or you'll look through an email file and -- no, we cannot make any commitments; can you give us any information? No, we can't give you a drop of information.

So, basically, they have said there's a curtain. We're the Wizard of Oz. You can't get anything. All we're trying to do is create a little more of an -- a balance of the equities here and say, listen, we just want to know what the situation is with the guarantee. We want a little information so we can figure that out so we don't have to keep going through this humungous charade of producing and depositions and on and on and on.

And our -- the scope of what we're doing is likely to be very narrow and very quick. I mean, we're not looking to, you know, bother people here. We're just trying to get to the bottom of whether there was a guarantee, get the people involved in the transaction, show them an email, say, here, it looks like there was a guarantee. Do you have it; do you have emails that are similar to this that show a

guarantee was passed back and forth. That's it. That's the main thing we're trying to accomplish.

THE COURT: It's obviously not very complicated in relative terms. But I'm confused about the procedural posture here.

I take it that no objection has been filed to the claim. Is that correct?

MS. SOMERS: Yes. That is correct.

THE COURT: But that as part of the claims review process, the plan administrator has directed discovery toward your client.

MS. SOMERS: Yes. That is correct.

THE COURT: And has your law firm been involved as an intermediary with respect to that discovery?

MS. SOMERS: Yes.

THE COURT: And in that process has there been any dialogue about whether your responses to the discovery would lead to either the allowance of the claim or a determination to object to the claim and, if so, on any particular schedule?

MS. SOMERS: No. I think that the exercise here is more settlement oriented. And so without divulging any --

THE COURT: Please don't.

MS. SOMERS: Yeah. I mean, it's just sort of

like, does this number work for you, and it's hard for my client to make a judgment because they're saying -- like we have minimal information. We could know what number works for us, but we can't just, you know, hit the bid if we are in the dark. And they're just trying to come to closure on that. I mean, they would love nothing more than to get a group of documents, figure it out, and say, hey, we can settle this at this price because it makes sense for us.

THE COURT: I'm further perplexed.

The discovery that you seek, as I understand it, is focused on whether or not there is documentation or other evidence to support an LBHI guarantee --

MS. SOMERS: Yes, because --

THE COURT: -- of the claim, correct?

MS. SOMERS: Yes, because there are emails that reference it. Yes.

THE COURT: Now to the extent that's the focus of the discovery, how does that discovery influence the business decision relating to this back and forth on possible settlement of the claim before any litigation regarding the claim?

MS. SOMERS: Well, certainly, if Lehman says, yes. We have an execute -- a guarantee that we executed and your emails refer to it and we have it in our file, here it is, then our settlement number is much different than if we

have, you know, some evidence of the guarantee, but we're not there. And we are trying to figure out how far there we are. We have evidence of an email that -- reference to a guarantee, and we just want to know, what do you have. You know, just show us what you have and then we'll review it and then we'll try to come to an agreement as to how we value, you know, this litigation and this claim like anybody else would do in a responsible manner.

THE COURT: One of the issues presented in the objection by Lehman is entitlement and standing in light of the confirmation of the plan.

And the plan administrator makes the argument that the plan provides for a right to 2004 discovery for the plan administrator, but for nobody else.

MS. SOMERS: Well, if I could respond to that?

THE COURT: Sure.

MS. SOMERS: Most of the law in this area says that you begin by what post-confirmation jurisdiction exists. And it's clear that Lehman has jurisdiction in this court to resolve claims. That's clear. We're all in this court to resolve claims.

And there are cases that say -- many cases just give you a right to 2004 post-confirmation, but others do a more diligent analysis of this shrunken post-confirmation jurisdiction and does it relate to the 2004 examination

theory requested.

And, here, nothing could be more squarely on point; that we're before this court to resolve claims. We are asking questions about the claim and that really is all that we're seeking. And there are cases that I have -- I haven't found one that does not allow an examination under these circumstances, and I don't think they cited a single case for that.

THE COURT: There's also a parade of horribles argument --

MS. SOMERS: Yes.

THE COURT: -- which is -- and I'm not going to use the squeaky wheel image again. But the reference is made to the recent hearing when I approved an extension of the period of time for the plan administrator to object to claims through September of 2015. And there were several parties that objected. And those objections, I think, can fairly be characterized as less about process and more about using the opportunity of the motion to say, we would like special attention, please.

It's now being argued that your 2004 request is an alternative means to the same improper end, namely to obtain special treatment in a claims reconciliation process that of necessity needs to be managed by the plan administrator without undue interference.

What's your reaction to the process point, which is if you get this relief and people are paying attention to the docket there will be a host of other motions for 2004 discovery, which will lead to potentially burdensome interference with the claims process?

MS. SOMERS: I might argue quite the opposite; that perhaps the plan administrator has not exercised enough diligence to put a process in place that fairly gives creditors a way to get information, to respond, to have it be somewhat of a two-way street. I am not saying that we are going to have as much freedom to ask for things as the plan administrator. But there has to be some give and take.

And I think here this puts the plan administrator to the task of exercising some discipline and not having an all-encompassing right to ask for anything they want and to have creditors have no rights at all to respond.

For example, if we had called the plan administrator's counsel and they had said, we understand we've asked you for a lot of documents. We understand you're just really interested in a few things. Let's agree to a limited exchange of information. I requested that. The answer was, we cannot do anything for you. I think that's a bad dynamic in this case.

I mean, it's -- the balance of the equities is so unfair. I'm not saying that we are all the rights of the

debtor, but give us -- or Lehman. But give us some rights. Give us some rights to get some information and to do our job for our client, too.

THE COURT: Okay.

MS. SOMERS: Thank you, Your Honor.

MR. FAIL: Good morning again, Your Honor. For the record, Garrett Fail from Weil, Gotshal & Manges.

We're not here this morning to determine the claims of Black Diamond and Double Black Diamond, the two guaranteed claims. We're not here to resolve those today.

We're also not here on the motion of LBHI to compel production of documents or compel sitting for depositions. We're not here for that.

We're not here on an objection of Black Diamond to discovery requests propounded by LBHI, objections that couldn't be resolved outside of this court. That's not up for discussion either.

What's being asked for today is discovery of LBHI, an attempt to balance the playing field in -- but, really, it's an attempt to have these claims resolved. Ms. Somers said they would like nothing more than to resolve the claim. Yes, we understand that. It's understandable. There are 40 -- 4,274 other claims that are looking to be resolved as well.

To suggest that the plan administrator hasn't been

diligent in putting together a process that expedites the claims resolution process is disingenuous when there have been over 64,825 claims resolved.

So --

THE COURT: But, Mr. Fail, let's focus on this one, though.

I was not aware in reviewing the pleadings that there had been this process in place between the plan administrator and Black Diamond and Double Black Diamond relating to requests for information directed to the claimants by the plan administrator, information having been turned over. And it doesn't really matter how many documents are involved. They don't sound like a lot of documents to me even though they're in the hundreds, but I'm used to larger --

MR. FAIL: It's hundreds --

THE COURT: -- numbers.

MR. FAIL: -- hundreds of pages, Your Honor. It's not --

THE COURT: Hundreds and hundreds of pages.

MR. FAIL: It's not significant.

THE COURT: It's not a big deal. But, still, documents were turned over, and presumably there is a -- an engagement here on the claim. This isn't a situation of one of the 4,275 claims or whatever the right number is of

claims that are in the unresolved camp seeking special attention because the plan administrator already is paying attention to this claim.

So one of my questions becomes, what's the problem, assuming you're already engaged in dealing with this claim, in completing the process? And why does it have to be by 2004 if that creates an adverse precedent? Why can't you just say, okay, we have these documents. We're going to sit on them, versus we have these documents and we're going to deal with your claim. I don't understand why we're making this all about the claims process instead of making this about, let's get this claim resolved. We've already focused on it.

MR. FAIL: Sure. A couple of points, Your Honor, in response.

Ms. Somers started this, and I think you began the question regarding conversations in a back and forth. The conversations Ms. Somers eluded to began less than 36 hours ago when she reached out to me after we filed our response and then she wanted to know, why don't we just give her the information.

So to resolve the 2004 motion our choice was to produce documents and give discovery, to put these claims ahead of others.

Could we commit to -- if we pushed this off could

we commit to doing what she wanted? In other words, if we didn't get a ruling against us, would we none the less concede to do discovery. We didn't want to set that precedent to encourage other people to take the same steps.

And could we give any other information, basically, can you just tell me -- can you just give me the discovery.

So three ways to get to the same result.

Another point, Your Honor, yes, the plan administrator has taken -- has sought discovery from Black Diamond, but not solely Black Diamond. The plan administrator files notices of every subpoena that it issues pursuant to the Rule 2004 order and authority of the court. It has issued subpoenas for over a thousand claims. It could be well in excess of over a thousand claims that are still outstanding. The review is ongoing. The plan administrator is multi-tracking and multi-tasking to get through the number of claims that have yet to be resolved.

Most of the claims, if not all of the claims, have been looked at by the plan administrator, and we're working and the plan administrator is working on multiple claims at multiple times. And so I don't believe it is correct to assume that just because the plan administrator has sought discovery or received documentation that the process is resolved.

We're hopeful that we don't have to invoke the judicial process and the court's time with an objection to all the remaining claims, and we've been successful in avoiding discovery disputes thus far. But to suggest that we haven't worked with Black Diamond over the course of the last year -- it's been a year since we issued the subpoenas -- is also disingenuous.

We granted extensions, Your Honor, with at least -- it's three extensions and we then were faced with this motion after granting the last one. We granted three extensions, didn't file a motion to enforce this. We've worked with every other creditor on it. There were hundreds or thousands of subpoenas outstanding with respect to claims. This is the first time that we're here. It's five years and three months into this case. So --

THE COURT: Well, there's a first time for everything.

Let me just make these observations, and it's not just about this particular dispute, but about the claims process more broadly.

When we had the hearing last month on the extension of the period for objecting to claims and we talked about the importance of an orderly process, I raised the idea of a protocol of some sort that the plan administrator might develop so that creditors like Black

Diamond and Double Black Diamond would have more transparency into the process that counsel describes as something akin to the Wizard of Oz. And whether that's a fair characterization or not, it's at least a vivid one.

And I don't know what progress, if any, has been made in reference to that understandable protocol such that parties like Black Diamond and Double Black Diamond would be able to know in the ordinary course of human events when it could anticipate receiving information and engaging in a process that would either lead to an agreed resolution of the claim or an objection to the claim.

So there is a general process concern that I have that you yourself brought to my attention in your papers. And that's connected to this particular motion, perhaps connected to this particular motion because you said it was.

But then there's also this other related concern, and that is even with a protocol that's understandable and hopefully acceptable to all parties, there will inevitably be creditors like Black Diamond and Double Black Diamond that will feel that this shouldn't be a one-way street of information sharing, and that if they're turning over information, that's great. But they need some information, too, in order to be able to engage in a constructive discussion about claim resolution.

So that then leads to the question, is discovery

only a one-way street and is that, in fact, the right procedure to set in concrete for the rest of the claims process, not only for this claimant, but for others who may follow?

So it seems to me there are at least two issues we need to talk about before resolving this today:

One is the status of efforts to develop a more transparent understanding as to how the plan administrator will be addressing the large class of unresolved claims. And I say that with all respect to the process that has been run to date, which has been heroic in resolving such a substantial number of claims; and

Secondly, what do we do with claimants like this who are looking for targeted information so that this process can run efficiently?

Those are two questions I think we need to deal with.

MR. FAIL: Thank you, Your Honor. And I think they're related and they do tie back to this motion because the standard for taking 2004 discovery is good cause, which is that it's either necessary to establish their claim or denial would cause the examiner, the person that's requesting it, undue hardship or injustice.

Here, discovery at this time is neither necessary to establish the claim, because there has been no objection

filed, and denial would not cause undue hardship which ties to your question, is this the right procedure; is discovery only a one-way street.

It isn't a permanent injunction. There is no permanent injunction on discovery. It's when -- as and when needed and a mustering and a direction of resources, of limited resources.

And is this the right procedure? The plan administrator believes it currently is because discovery will be available if settlement fails. If additional information is beneficial to the process in negotiations, the plan administrator can voluntarily negotiate through ADR or otherwise or outside the process with claimants, and it has done so.

The question is, should any claimant or anyone of the pending claimants say, now it's my turn, focus on me, just give me this, which as Your Honor knows, sometimes is simple, but sometimes is not in a case where information is scattered, information isn't necessarily readily available, information is expensive to determine if it is available. And then to collect it, to take it from tapes and turn it into something that could be searched, then can be examined for production, then can be produced.

Here we're talking about underlying claims that are $11.2 million in guaranteed claims for that. There are,

I think, $130 billion of unresolved claims.

So to allow an individual creditor to determine that now is the time to spend or focus on discovery with respect to its claim, I was -- just isn't the right approach. The plan administrator is dealing with large and small claims at the same time and has resolved large and small claims. This morning we'll be presenting an order to reduce the IRS's claims, I think, by $1.8 billion.

At the same time there was a withdrawal of a less than a million dollar claim yesterday. So we're multi-tasking, but to suggest that discovery should be prompted by the creditor, every creditor's claim is important to that creditor. We suggest that the -- that it's not ripe, as Your Honor said and as we've said in our papers.

It may be necessary -- it will be available if we can't reach a resolution, but the plan administrator shouldn’t be negotiating from a position with a gun to its head. And if there are issues with discovery propounded by the debtors, we have to date and -- or we will continue to work to resolve that with individual creditors on an individual basis. But that's not what we're here for today.

THE COURT: Okay. I've -- I appreciate everything you've said.

MR. FAIL: And I didn't -- I'm sorry, Your Honor. I didn't respond to your other question about --

THE COURT: Well, I'm about to --

MR. FAIL: -- the status --

THE COURT: I'm about to move toward that with a suggested modification to my question.

Is it conceivable that the protocol which I have described in the most general terms because I truly don't understand all that is involved in developing a truly intelligent work plan for the resolution of the remaining claims.

But let's just assume that inside that black box of procedures there may be a set of procedures relating to the sharing of information once a claim has reached the front of the queue. Is there or is there not a current set of procedures short of outright claim objection, thereby creating the discovery rights of a contested matter, for claimants to obtain the information that they need to engage in the back and forth that is the essential ingredient of bargaining?

MR. FAIL: Your Honor, based on the comments at last month's hearing, LBHI and the plan administrator is working on presenting an update on where things stand and working within the parameters of Your Honor's statements last month to protect privilege, to protect litigation strategy, to protect the interests of the estates for the benefit of all creditors allowed in and disputed to figure

out what we can do to shed light on the current process. Rather than committing to a particular protocol with how to move forward, it has evolved over the last years as claims get resolved and focuses are redirected.

And to suggest that any one plan developed would be static or that any timeline could be rigidly followed, we're looking into what we can set forth to provide information to creditors in terms of a timeline, a realistic timeline and our efforts to date and going forward. Our intention is to go forward.

In terms of can the -- can LBHI provide information? Yes, LBHI can. Yes, LBHI has. LBHI has been successful in resolving claims to date. We have back and forth through ADR. We have been without information back and forth.

And so LBHI, in its discretion and in the best business judgment for the benefit of all creditors, has worked. Does that mean that efforts would be directed or should be directed to conduct discovery for every claimant that wants it? We don't believe so at this -- you know, at the time chosen by that creditor. In -- at some point, yes, if it can't be resolved or the debtors don't feel it should be resolved in another way. There will be that opportunity.

So we are working to present to the Court an update and our outlook on going forward.

THE COURT: Okay. So let's look at Black Diamond and Double Black Diamond for a moment because this is the particular issue that forces us to confront the general question.

Is it possible for the time being at least to either defer or deflect the question of creditor entitlement to 2004 relief on a scheduled determined by that creditor, which is part of the problem here, by resolving this without making a 2004 determination?

In other words, is it desirable in your view so as to avoid adverse precedent, especially before you've had a chance to disclose the general approach to this, to defer resolution of the 2004, but in the process of deferring it also consider voluntary sharing of information without coercion?

And would that work for everybody, because one of the things that concerns me is the parade of horribles. And while Black Diamond and Double Black Diamond talk about this in benign terms, that we're just seeking some information so that we can further engage on a process that has already begun, in hearing the plan administrator's response I now understand that Black Diamond is part of a large class of claimants that have received discovery requests that are allowing the plan administrator to do its job in evaluating those claims.

In part for that reason I am, frankly, very concerned about the consequence of granting this benign relief only to have 2004 requests made by some subset of the thousand, or let's just say it really is a parade of horribles, all one-thousand that have already received discovery because that's obviously disruptive. And somebody has to be in charge of this process and it has been set up that the plan administrator is.

So this is a somewhat convoluted way of saying I'm not granting the 2004 request, but I'm concerned about the issues that the 2004 request brings to my attention. And it, in effect, becomes a second bite at the same apple that we talked about last month. How do we more fairly, from the perspective of creditors, deal with this huge workload so that parties on the outside understand how their claims are being addressed.

And at least in the case of information sharing I would like to know whether or not there is any organized procedure for sharing information prior to the filing of objections to claims. If this is happening in the discretion of the plan administrator, that may be okay, except to the extent that somebody is adversely selected out of getting the information that they want.

So there needs to be some set of understandable standards that apply to information sharing and to

determining the order in which unresolved claims will be addressed. And if the answer is -- and I'm not looking for it now -- we have a big pile of papers on a desk somewhere and we're dealing with the claims in whatever order they happen to end up in that pile, that's at least an answer.

If the answer is, we have all the claims in a database and the claims are spit out randomly and we address the claims in the random order in which they are presented to us, that's an answer.

If the answer is, we have the claims stacked by size and we're dealing with the most material claims first, another answer.

If it's by category, type of claim, again, another answer.

If it is you pointed out the most extreme example of multi-tasking and a lot of things are happening simultaneously because different people have responsibilities, that, too, would be an answer.

And it may be that none of the examples I've provided is an apt one. But I think at this stage of the case, particularly as it is now widely known that I'm not going to be sitting in this seat handling it after January 31, it's important that there be a legacy of consistency and fairness that applies to the claims reconciliation process, something that works for the plan administrator, but that

also makes sense from the perspective of creditors and gives those creditors who are now waiting some understanding of the process.

I mean, even when we buy Powerball tickets, we know what the process is. We don't expect that we're going to win, but we buy the tickets anyway.

And so while that may not be exactly what's happening here, in effect, there's a lottery aspect to this in which claimants don't know when their number is going to come up. Now that may be a necessary feature of dealing with so many claims. But if there were a way to provide greater transparency into this process, I think that would be desirable.

And as to Black Diamond and Double Black Diamond in particular, I'm denying the 2004 request, but I'm doing so with the suggestion that rather than deal with 2004 issues again, we might wrap this kind of concern into the process that I'm asking the plan administrator to develop.

MR. FAIL: Thank you, Your Honor.

LBHI believes that the legacy of fairness has already begun and exists over the past two-and-a-half years since confirmation, and even before then over the past five years of the whole process.

I think that's spoken for by the few outliers, the two instances recently in the past month of a creditor

raising an issue and with respect to both of those creditors, those were creditors that had been in touch and involved with the plan administrator.

But we look forward to working to put something forward that could shed light on the work streams, the work that's been done, and LBHI's outlook for going forward.

THE COURT: Okay.

MR. FAIL: Thank you, Your Honor.

MS. SOMERS: Your Honor, if I could just make a suggestion. I understand that you're not granting our motion today, but I would suggest that it be adjourned for a period of 30 days so we could see what process it puts into place; that we not be sent home without any idea of what's going to happen. If nothing is filed on time, then we're in the same position we always have been.

THE COURT: Well --

MR. FAIL: Well, Your Honor, I -- if I may?

THE COURT: Uh-huh.

MR. FAIL: LBHI believes it's incredibly important to have an order denying this motion, not adjourning it. The burden on a movant for 2004 is not -- is an affirmative one to show cause and not just to show that it wouldn't be harmful to the person who they're -- from whom they're seeking discovery.

Black Diamond has not met that standard, either

prong. It is not necessary to determine its claim, and it would not cause undue hardship to wait until the moment that it's necessary and then take discovery from electronic archives.

THE COURT: I'm denying the 2004 request without prejudice to its being re-urged at some future date based upon either a demonstrated need for such discovery or a showing that the procedures, as they are applied by the plan administrator, are prejudicial and that this kind of procedure is appropriate.

In saying that, I am not in any way modifying the legal standards applicable to the grant of a 2004 motion at this juncture, and note in particular that it is intrusive and disruptive to an orderly process for any individual creditor to seek to alter the scheme by which the plan administrator is administering claims, even if that scheme is not apparent to the creditor.

Okay.

MR. FAIL: Thank you very much, Your Honor.

MS. SOMERS: Thank you, Your Honor.

MR. FAIL: Your Honor, may we be excused from the court?

THE COURT: Yes.

MR. FAIL: Thank you.

(Pause)

MR. TAMBE: Good mroning, Your Honor. Jay Tambe from Jones Day for the debtor on the --

THE COURT: Let's --

MR. TAMBE: -- adversary proceeding.

THE COURT: Let's just give everybody a chance to assemble.

MR. TAMBE: I'm just going to introduce Mr. Brilliant who is going to -- it's his motion, so --

THE COURT: Right.

MR. TAMBE: -- he's going to be speaking.

THE COURT: Okay.

MR. TAMBE: Thank you, Your Honor.

(Pause)

THE COURT: Be -- before we get into the merits of the motion to dismiss, there's a matter that we discussed in reference to this adversary proceeding in an off the record chambers conference, and I've heard nothing further with respect to the subject matter of that conference.

I have a question for the parties, which is whether there is anything to report and, if there is, whether you would like to report that now or after the argument. And if you would like to report it to the Court, would you like to do so in camera off the record or are you prepared to do it on the record?

MR. TAMBE: I think, Your Honor -- this Jay Tambe

for the debtor. There are some developments to report. I believe the preference of the parties at least would be to do it off the record, not on the record, and we're happy to do it either before or after the argument.

THE COURT: Is that true for you, Mr. Brilliant, as well?

MR. BRILLIANT: Yes, Your Honor. We're prepared to do it on the record if Your Honor prefers. I don't know -- I don't think there's any -- you know, we don't view it as being, you know, confidential. But we're prepared to do it off the record as well if that's what LBHI prefers.

And if we're going to do it off the record, we would suggest, unless Your Honor wants to take a short recess now, then we would suggest doing it after the argument.

THE COURT: Okay. Let's do it that way.

MR. BRILLIANT: Good morning, Your Honor. Allan Brilliant on behalf of the defendants, the Tschira entities, and I'm joined at counsel table with my partner, David Kotler.

As Your Honor knows, we're here on our motion to dismiss all of the counts of LBI's complaint.

As Your Honor knows, under the complaint LBI seeks to avoid the transfer of 100 million Euros of collateral that was transferred to the Tschira entities to secure

obligations that LBF had to the Tschira entities under certain ISDA agreements.

Your Honor, I'm going to divide my argument into three different sections.

First, I'm going to discuss the safe harbor provisions of Section 546. The strict application of Section 546 of the Bankruptcy Code, Your Honor, is going to require that the preference constructive fraudulent transfer and the state law actual fraud claims be dismissed. Your reasoning in the LBHI JPMorgan decision is equally powerful here and it's a mandate to dismissal of such claims at this time.

Second, Your Honor, I'm going to demonstrate to the Court that under any pleading standard the complaint does not plead facts to establish a plausible claim or actual fraud, much less raise a strong inference of fraudulent intent to state a cause of action for actual intent, hinder delay or defraud under Section 548(a)(1)(A). Here, where there transfer was made of collateral, made to parties that were not insiders, made to parties that had no special relationship or leverage over the -- over LBHI, it's just not plausible to say that such transfers were made with actual fraudulent intent.

And then finally, Your Honor, we're going to show Your Honor that the three state law causes of action --

unjust enrichment, constructive trust and fraud -- should also be dismissed as a matter of law for failure to state a cause of action.

Your Honor has ruled, you know, at least twice in the Lehman JP Morgan case as well as in the Quebecor case in connection with Section 546(e). So I think you're very familiar with the statute. In order for us to show that the safe harbor applies, all we need to show is that there was a transfer; that it was made by or to or for the benefit of, among others, a forward contract merchant, a stockbroker, a financial institution or a financial participant.

And I'm going to call the whole group of parties, you know, qualified, you know, parties for purposes of the argument. And we'll talk about the individual, you know, definitions here. But when I talk about them collectively I'm going to talk about them as qualified parties.

Third, we just need to show that the transfer was made in connection with the securities' contract as defined in the Bankruptcy Code or a swap agreement as defined in the Bankruptcy Code, or, as Your Honor knows, you know, the statute also provides a safe harbor for all margin payments or settlement payments that are made by or to or for the benefit of a qualified party.

As the Court recognized in the JPMorgan decision, to protect the expectations of the marketplace, it is

imperative to dismiss a complaint on the basis of the safe harbor at the earliest possible stage, including, when appropriate, at the time of the motion to dismiss.

Now, Your Honor, since it's the easiest of all of the tests I'm going to talk about, you know, transfers in connection with a securities contract first.

Now LBHI doesn't dispute that there was a transfer; that the two, you know, payments here that were made with -- which aggregate 100 million Euros, they don't dispute that those were transfers. And, of course, they couldn't because it clearly meets the definition of a transfer under 101(54). It was a transfer of cash to the entities, you know, here.

They also don't dispute that the transfers were made by, to or for the benefit of a qualified party. And, again, they really can't dispute that. Clearly, the party who made the transfers, LBHI, has a financial institution. It's a financial participant. It's a -- you know, forward contract merchant. LBF, who they say in their complaint is who the party -- who the transfers were made on behalf of is also a financial institution and a financial participant and a forward contract merchant.

So there's no doubt that these parties were made by, you know, to or on behalf of qualified parties. And as we show, you know, in our papers, in our motion to dismiss,

Your Honor, you know, just based upon these particular, you know, transactions, the two Tschira entities, each of them had over a billion dollars outstanding of transactions and, therefore, they qualify, you know, as financial participants.

So I don't think there's any -- they don't challenge that these transfers were made by, to or on behalf of a qualified party. In each of the three, you know, tests there -- we only have to show one, but each of the three tests are met there as well.

You know, third, Your Honor, they don't dispute that the ISDA agreements and all the, you know, other agreements, you know, that make up the transactions here, that they're security contracts. You know, and nor could they, you know, dispute that as well.

As Your Honor knows, the definition of security contracts is very broad. You know, it's defined in Section 741(7)(a) and it's just very broad and it includes all contracts for the purchase and sale of securities.

And here, as Your Honor knows, that the agreement that was entered into, you know, via LBF and the Tschira entities provided for the -- you know, the future sale through, you know, puts (sic) and calls and various other arrangements at various prices of shares in the publicly traded company, SAP. So there's just no doubt here that

this is a securities' contract.

And then also, Your Honor, what's notable is that LBI -- LBHI also doesn't dispute that the contracts are swap agreements, as that term is used in 546 -- you know, 546(9).

Now LBHI -- I'm sorry, 546(g), Your Honor.

Now LBHI does dispute, you know, as to whether or not the agreements were forward contracts. You know, given that the -- you know, that this was made in connection with a securities agreement and a swap agreement, you know, I don't think it really matters that much. I'm not going to spend a lot of time on it. But these are, you know, forward contracts as defined in the Bankruptcy Code, you know, and they're just wrong about that.

And when -- if Your Honor, you know, looks at the definition of a commodity in connection the Commodity Exchange Act, you know, it's very clear that a commodity -- which is the reason they say that this is not a forward contract because it's not a commodity -- is -- that a commodity also includes a good or a right. And clearly these agreements, which provide for the -- you know, the future sale of a security, the ASP shares are goods and rights under the statute and, therefore, they are commodities and, therefore, this is a forward -- you know, a forward contract. I don't think there's, you know, any doubt with respect to that.

So the issue, Your Honor, that they do raise is whether or not these transactions were in connection, whether they were in connection, you know, with the securities contracts, whether they were in connection with the swap agreements, whether they were, you know, in connection, you know, with a forward contract.

Now, Your Honor, most of the arguments, you know, they raise are the same arguments that LBHI raised in the JPMorgan case and that Your Honor already, you know, rejected. They do raise a couple of new ones. We're going to deal with all of them here.

Now as Your Honor found and as the Second Circuit, you know, has held, you know, that the definition of in connection, you know, is to be interpreted liberally and that it means, related to. It's a very broad, you know, definition.

And if you read the complaint, Your Honor, they make it very clear that these transfers were made in connection with the amendments to the credit support agreement, which was part of the -- you know, the transactions, you know, for the -- under the ISDAs.

So under their complaint itself they make it very clear that this was made, you know, in connection with the amendment that was entered into, you know, by LBF. And throughout the whole complaint they talk about the fact that

LBF entered into the agreement and then, you know, they provided, you know, the funding on behalf of LBF. So I don't think there's any doubt that the way they've pled their complaint that this is in connection with or related to the -- you know, to the agreements.

Now they -- and under the agreement it's very clear that the monies that were transferred were going to be considered to be, you know, independent amounts under the credit support, you know, annexes, collateral, you know, for the obligations, you know, under the, you know, obligations that LBF would have in connection with the -- you know, the security contracts.

Now they made a similar argument in connection with the JP, you know, MC case, Your Honor, which Your Honor rejected where they basically said, you know, because the parties were over secured at the time and that it was a -- you know, that it was a pretext for seeking to have, you know, the monies, you know, applied, you know, in connection with the -- you know, as -- you know, saying that it was in connection. And, Your Honor, you know, rejected that and that's at page 442, you know, of Your Honor's opinion.

And Your Honor wrote there, which is equally true here:

"Given this liberal interpretation of in connection with the disputed collateral transfers

necessarily relate to safe harbored securities contracts. For example, the amended complaint itself points out that JPMC demanded the disputed collateral transfers under the September agreements. See first amended complaint, paragraph 62, noting that the September collateral requests were made pursuant to the September agreements, but arguing that such a purported connection to clearance activity was a pretext and a sham."

You know, and then you, you know, cite another section of their complaint, which I'm not going to read, and then you went:

"Furthermore, the agreements themselves expressly reference safe harbor derivative transactions and safe harbor clearing advances."

I'm going to skip the doubt. I'm going to skip the -- your cites there, Your Honor, and then you conclude with:

"Without doubt, the disputed transfer of collateral related to the safe harbored clearance agreement, the September security agreement and the September guarantee."

And there's no difference here, Your Honor. They plead the complaint the same way that they did in connection with the JPMC, you know, complaint. They make the same argument here that somehow this free collateral that existed

was -- they say in their complaint was just implicitly, it was made in connection with that. But the reality is, Your Honor, this was collateral that was put in place, an independent amount under the credit support annex in connection with the securities -- you know, the securities agreements, the same pleadings and the same types of facts that Your Honor rejected in the JP, you know, Morgan case.

You know, additionally, Your Honor, you know, they raise the same argument that we were over secured at the time or that, you know, from a market to market prospective at the time that the transfers occurred that -- you know, that there was no monies outstanding and, therefore, you know, it couldn't be, you know, be collateral.

You know, the same argument that Lehman, LBHI, made in connection with the JPMorgan case and Your Honor rejected that as well. You know, actually in the following paragraph also on page 42 where Your Honor says:

"Additionally, the suggestion that there should be demonstrable exposure as a condition to satisfying the in connection with language of Section 546(e) advocated by plaintiffs would make it difficult to assure safe harbor protections without making an impractical and burdensome inquiry as to the status of countless derivative positions at arbitrary points in time in the multiple dealings between counterparties. Such a focus is not well-suited to

analyzing liabilities under complex financial relationships with exposures that change materially and rapidly with movements of the markets.

"Therefore, the Court concludes that the disputed collateral transfers are within the scope of 546(e)," and then Your Honor dismissed, you know, those counts.

And that applies equally here as well, Your Honor. You know, there -- the -- there's nothing in the statute that requires that a party be under secured at the time the transfer is made. As long as there's a transfer, you know, to a qualified party, to -- by, to or for the benefit of a qualified party in connection with a securities contract, the safe harbor, you know, applies.

And, clearly, all of those elements are met and there's nothing in the statute that requires that a party, you know, be over -- under secured at the time or that -- in order for it to be considered to be, you know, a transfer or for it to be considered to be, you know, in connection, you know, with a transfer.

Your Honor, the only case that's cited by LBHI, you know, in connection with their argument that somehow some portion of the transfers were, you know, in connection with the free assets, you know, is they cite, you know, a Calyon case from the Bankruptcy Court in the District of Delaware and that case does not involve Section 546(e), but

instead involves other safe harbors. You know, the safe harbor, you know, from -- for the stay in connection with -- you know, with repos. And the case has nothing to do with this situation, nothing to do with an interpretation, you know, of 546.

Even if they were right, which they are not, and when you look at the documents, Your Honor, it's -- and it's absolutely clear that this transfer was made, you know, in connection and can only be used as collateral in connection with the security contracts. But even -- so there's no question that they're just wrong as a matter, you know, of fact and they're just trying to mischaracter -- they're just trying to characterize and spin, you know, what this transaction was done in a way that's different than what's in the complaint.

But even if they were right, the reality is that under Section 546 as long as it was -- relates to the securities contract, you know -- and relates as Your Honor says is very broad. You know, so it's almost in connection -- then the safe harbor applies. It doesn't -- it wouldn't matter if there were other reasons as well. They say it was implicitly done, you know, in connection with the free assets.

I think that's just wrong and it's contrary to their own pleading. But even if that were right, it still

wouldn't change the result because it still relates to the securities contract and therefore -- therefore 546, you know, would mandate dismissal of the -- of those counts.

Your Honor, they also, you know, claim that in connection with -- that the transfers weren't made pursuant, you know, to a contractual agreement, again, because, you know, there's argument, you know, that we weren't entitled to any additional collateral because, you know, we were in the money at that point in time.

Again, Your Honor, you know, that's rejected. Your Honor rejected that in connection with the JPMorgan decision. And, you know, the argument and the reasoning that Your Honor had there, I think, you know, applies equally here. And even I think a little more powerfully here than in that case where Your Honor had to deal with not just the issue of whether the transfers themselves were covered by Section 546(e), but also had to go a little bit further and determine whether or not the creation of obligations, whether or not additional parties who became guarantors, whether or not, you know, that was covered. And Your Honor ultimately concluded it was.

But here they have -- they were the credit support party. LBHI was the credit support party. They had signed a guarantee here, which in and of itself is also, you know, a securities, you know, contract under the definition of --

in the Bankruptcy Code.

But here they were already a party. They had agreed to provide the credit support. So it -- there was a contract in place. But, again, you know, that's not really relevant. It doesn't matter. It was a transfer, whether or not they were required to make the transfer or whether they were contractually bound to make the transfer, whether it was a prudent thing, you know, to make the transfer is not really relevant here.

THE COURT: Okay. Part of the mystery here, Mr. Brilliant, is not really the contractual provisions and not really the words of 546, not really the language of the JPMorgan decision, which obviously I am familiar with, and it pleases me every time you quote from the decision.

(Laughter)

THE COURT: This is a confusing fact pattern. And the more you argue about the facts, the more confused I become reading your papers and, frankly, reading the Lehman papers.

A rational observer would say, why on earth would LBHI, at a time of extraordinary financial crisis that is well-documented, transfer a hundred-million Euros in connection with an obligation that primarily is LBF's for the ultimate benefit of your client. What connection does this all have to what Lehman refers to as the free assets

that were pledged to LBIE in London, and what coercion, if any, may have caused senior level people within the Lehman enterprise to do something that no rational party would do at that time because part of what makes this transfer so hard to figure out from the perspective of a neutral observer is that it took place at all.

And so it becomes somewhat clinical to talk about this as a transfer covered by the safe harbors in a context in which the transfer itself is so hard to understand.

And I wanted you to know that that's one of the problems I'm having with the argument at this juncture.

MR. BRILLIANT: Sure.

THE COURT: It doesn't mean that the argument may not have significant merit at a later stage in the bankruptcy case.

MR. BRILLIANT: Can I address that, Your Honor?

THE COURT: Sure.

MR. BRILLIANT: Sure.

Your Honor, I think what -- Your Honor points out, you know, something which is very important here. The context we're here on today is in connection with a motion to dismiss. They filed a complaint. You have -- and we're here to determine whether the complaint itself, as a matter of law, you know, states a cause of action and whether, as a matter of law, Section 546(e) provides a safe harbor, at

least with respect to certain of the claims that are raised here.

Now Your Honor points out something which is very important. You say it's confusing to you because there's no indication in the complaint as to what the motive was as to why this transfer was made, and you can't figure out from reading the complaint why it is that a party would do this. You say that, you know, it just doesn't make sense given what you know about what was going on at that point in time.

But, Your Honor, the point is that you have to look at the complaint and determine whether or not the safe harbor applies based on the complaint and you -- and when you analyze the actual fraud counts and various other things, you have to look at that.

So you say you're concerned as to why they would do this, you know, what coercion occurred. Your Honor, if there was coercion you could be certain they would have included it, you know, in the complaint.

THE COURT: Well, I don't mean to focus on that. And you're quite right that we look at the complaint and we assume that the allegations in the complaint are true for purposes of the motion to dismiss.

But this is a little different, at least in terms of all the pleadings that I've reviewed from a clean motion to dismiss. Bear with me when I try to define what I mean

by clean.

A clean motion to dismiss is one in which the complaint, on its face, fails to state a claim upon which any relief can be granted and, in effect, it doesn't matter if you admit all the facts.

But in the very carefully and thoughtfully prepared papers that I've reviewed, both your papers and the Lehman papers, this is a very confusing set of circumstances, even for someone like myself who is quite familiar with the circumstances of Lehman in the days before filing.

As you may know, and as certainly counsel for Lehman knows, I spent weeks, months in the 60(b) trial learning about what was going on in the period leading up to Lehman's bankruptcy filing on September 15th of 2008. And so I have a very detailed and fact-based understanding of that period of time.

This complaint deals with that very period of time, but deals with it in a way that's completely separate from all the facts that I otherwise know because it describes a transfer not made to a major financial institution. And I've dealt with those cases. The Bank of America litigation, the JPMorgan litigation are examples of that. And the transfers that were made to other financial institutions to improve their positions in the summer of

2008 are detailed in the examiner's report.

What makes this unfamiliar is that it's a transfer that seems inexplicable. It doesn't improve liquidity. It doesn't incentivize a third party to provide needed services. It diminishes liquidity at a time of extreme liquidity constraint, and seems designed not to benefit any party other than either your client or LBF.

And so I look at this and I'm completely mystified by it, not just as a neutral observer, but as a neutral observer with a lot of information in my head as I'm reading about this.

MR. BRILLIANT: Right.

THE COURT: In part for that reason, one of my conclusions, especially since the parties are engaged in discovery, is that the legal issues that you properly raise -- and I believe they are properly raised as legal issues to consider -- are difficult to address in a motion to dismiss where the facts are quite as convoluted as they seem to be here.

And so I raise this question with you. Inasmuch as you are engaged in discovery, and I recognize that you are looking for a clean kill with respect to the complaint. But since you've also read the JPMorgan decision, you should be of the view that that's highly improbable if not impossible to achieve on a motion to dismiss. What harm

would there be if the very same legal issues you're now arguing with respect to the safe harbors were deferred until a later date when those arguments could be made in a dispositive motion supported by a factual record?

That's my essential question.

MR. BRILLIANT: Okay. All right. Well, you know, first, Your Honor, with respect to -- now we're just talking about the safe harbors right now. I think there's a strong public policy -- Your Honor pointed out in connection with the JPMorgan case -- of making sure that parties who receive safe harbored and protected transfers have that resolved at the earliest, you know, possible time. And when, on the face of the complaint, there is, you know, an opportunity to dismiss it, Your Honor should do that. That creates certainty for people in the marketplace.

Your Honor not granting this, you might say, well, you know, in connection with your complaint it doesn't have any affect. But as Your Honor and the -- you know, the Second Circuit in connection with the Enron case, you know, has recognized, the safe harbor and the comfort that parties get for it affects pricing, you know, for securities transactions, you know, and other issues.

And Your Honor denying us on the -- we're at this point in time -- I understand that Your Honor says you acknowledge outside of this complaint and when you bring --

you bring that with you when you come into the -- you know, come into the courtroom. But the reality is on this complaint, you know, we've established that as a matter of law, you know, we're entitled to have the safe harbor applied and to have those, you know, counts dismissed.

As Your Honor knows, we sought to stay discovery as we believed that this complaint is not -- is ill-founded. And I know Your Honor says that with respect to the JPMorgan case, you know, we shouldn't be surprised if you -- you know, if Your Honor doesn't dismiss the non-safe harbor issues.

But the issue here, Your Honor, is very different. In the JPMorgan case they point out a lot of economic coercion. And Your Honor, I think, properly describes that complaint as a question as to under what circumstances a -- you know, it becomes actionable where there's economic coercion, you know, by a party, you know, during the midst of a financial crisis. And, also, that involves, you know, 90 counts and the parties had voluntarily agreed to discovery, et cetera.

We, as Your Honor knows, have -- you know, did not voluntarily agree to discovery and that the Supreme Court has pointed out in Iqbal and Twombly the reason for a motion to dismiss is to limit parties' expenses from having to go through, you know, a process of discovery, you know, et

cetera when the complaint, as a matter of law, you know, doesn't --

THE COURT: Mr. Brilliant, I hear you, but let's see this in the context in which it arises because while I must look at the complaint and determine its legal merit in the context of your motion to dismiss, I'm not blind to the context in which this arises and, indeed, the papers themselves advert to the context in which this arises, namely there is a settlement with LBF in the Swiss proceeding that your client has objected to. There was litigation before me with reference to proofs of claim objected to by Lehman. Those proofs of claim were filed by the Tschira entities, ultimately withdrawn in a litigated setting in which the preclusive impact of the withdrawal remains an issue today.

I am aware, both from pleadings and from the comments of counsel, that this is a litigation that is but one relatively small part of a global litigation involving the Tschira entities in Switzerland, in the U.K. and here.

So it becomes very difficult for you to talk about the costs of an adverse safe harbor determination at the motion to dismiss phase in reference to what is really not a safe harbor case at all. This is a safe harbor defense being made to a transaction that is but one part of a massively complicated dispute between your client and

different Lehman affiliates.

That context is inescapably in my brain.

MR. BRILLIANT: Okay. Can I address that, Your Honor? I want to --

THE COURT: Absolutely.

MR. BRILLIANT: -- make sure that I gave you -- I don't want to cut you off, but, Your Honor, we are here -- the only thing that is pending in front of this Court, that is pending between these parties in the United States of America and pending in front of this Court is this adversary complaint.

THE COURT: That's true.

MR. BRILLIANT: And we are here in connection with our motion to dismiss under 12(b)(6), the adversary complaint. It is absolutely clear what Your Honor is supposed to do in connection with analyzing that. You're supposed to look at the complaint and determine whether or not, as a matter of law, it states a cause of action for which relief can be granted, taking into account, you know, the controlling precedent of the Supreme Court in Iqbal and Twombly and the Second Circuit, and with respect to the safe harbor, you know, provisions.

I recognize, Your Honor, that LBF and our -- and my clients have a dispute that is being litigated in Switzerland, and I also recognize that they have a dispute

that's being litigated in the United Kingdom. But that has nothing to do with what is pending here. A lawsuit was filed. It does not state a cause of action.

As a matter of law -- and Your Honor should look at the complaint itself and analyze it. And I understand that you have all this other knowledge as to what's going on --

THE COURT: Yes, but I have this knowledge from your papers.

MR. BRILLIANT: No, Your Honor --

THE COURT: Yes.

MR. BRILLIANT: -- Your Honor --

THE COURT: You pointed out in your papers that the transfers ended up being credited --

MR. BRILLIANT: Uh-huh.

THE COURT: -- and that they were part of the European proceeding; that there should be no right to relief in any event because I think it was 52 and 48 or 54 and 46 million Euros -- I forget the two transfers, but it was something like that -- ended up being credited over there. It -- you in your motion to dismiss didn't make this a clean argument about what's in the complaint, but provided me with context so that I would better understand --

MR. BRILLIANT: Right.

THE COURT: -- what's going on.

It's not just what I know, it's what you've told me.

MR. BRILLIANT: Right. But, Your Honor, but in -- look, there's two issues here, right, Your Honor? One is the issue of the settlement and the objection to the settlement, which you're well aware of and you referred to earlier. Okay. And we did not put that in our papers. You know, LBHI did.

You know, the issue with respect to, you know, the -- you know, what's going on and the fact that this is being, you know, litigated is relevant for the state law claims. It is not relevant for the 546(e) claims and we don't raise it in connection with the 546(e) and (g) claims. It's only, you know, relevant, you know, in connection with the unjust enrichment and constructive, you know, trust argument.

The issue as to where the money would go back, you know, that it would go back to LBF, is in the amendment which is, you know, discussed, you know, throughout the entire pleading here.

But, Your Honor, what -- regardless of what is going on outside the United States does not change the fact that when one looks at this complaint and looks at the agreements, the ISDA agreement, the credit support annex, the amendment and the other documents that the safe harbors

clearly apply as a matter of law.

The only issue that -- Your Honor, there's really three issues here. You know, they only raise three issues in their papers: One, as to whether or not the transfers were in connection with the -- you know, the securities contract. You know, as I -- you know, their raised three arguments that Your Honor already rejected in the JPMorgan case and, you know, the same should go on here.

If anything, Your Honor, given that they do not claim in their complaint any economic coercion on behalf of our clients, but the opposite; they say we were not mission critical, you know, to -- you know, to their business, there shouldn't be, you know, any distinction between, you know, the analysis that you had in your prior decision and this one with respect to that.

They then raise two additional issues, Your Honor. One is this Ponzi scheme exception. They somehow say that there is a -- you know, the Ponzi scheme, you know, exception that Judge Rakoff, you know, has found in connection with the Madoff case, you know, which is limited to a -- just a very small portion of people who knew, who knew that there were no legitimate securities transactions going on, that somehow that should be expanded broadly to subsume all of 546(e).

And, Your Honor, you know, that's just not right.

That's -- you know, Judge Rakoff's decision is very narrow and limited and it's very clear based upon his other decisions where he does apply 546 to people who didn't know that there were not legitimate securities transactions going on. It just doesn't apply here. There's no doubt that Lehman Brothers entered into, you know, real security transactions. LBF entered into a real security transaction under the agreements.

And then the last issue, Your Honor, is the issue of res judicata which, quite frankly, Your Honor, has clearly a question of law and, you know, doesn't apply in this context. As we point out in our papers, you know, it's a -- they never -- first of all, it's not a compulsory counterclaim to -- you know, to file an avoidance action to a proof of claim. They never raised it as part of that. But if somehow our claim, you know, is barred because it could have been raised in that claim, then they're fraudulent conveyance claims would have to be -- you know, would have to be barred as well.

And then the second thing, Your Honor, is as much as they would like to make an issue as to whether or not we were in the money or out of the money as of the date of the -- you know, the bankruptcy filing, which was relevant for the guarantee claim, it clearly is not relevant for a fraudulent, you know, transfer claim. It was a transfer of

collateral. If you were over -- if we were over -- if we got monies and we were over secured, then we were over secured. If it turns out that we were under secured, then we were under secured.

But, Your Honor, on this complaint, that -- I understand that you say, well, the complaint raises an issue for me. It's confusing to me. There's no -- I don't understand why they would give the money. Why would they do that? Well, it's their burden, you know, to plead why they would do that. It's their burden to show what the motive was. It's their burden, you know, to allege what they think the connection was such that, you know, LBHI would have given, you know, this money at that point in time.

There are a lot of benign possibilities, you know, that -- at the time. They thought that they were going to be saved and they wanted to maintain a good relationship with LBF and with our clients.

THE COURT: Okay. Well, let's refocus on the question that led us down this path.

Assume for the sake of argument right now that I'm not going to grant your motion to dismiss in its entirety, and assume for the sake of discussion right now that the parties are engaged in a discovery effort such that you will be able, at some point, assuming the facts support your position, to re-urge the very same defenses to this

complaint that relate to 546(e) and the safe harbored claims.

In what respect, if at all, is Tschira harmed by deferring a determination of the 546 safe harbored claims to a later date in the proceeding when the confusing facts at issue can be resolved with clarity?

MR. BRILLIANT: You know, again, Your Honor, you know, by not narrowing the issues you open us up to, you know, more expansive discovery.

THE COURT: Isn't it the same discovery? Aren't the --

MR. BRILLIANT: No. No, Your Honor.

THE COURT: Aren't the transfers in question absolutely identical? The only issue, it seems to me, is whether you have actual or constructive, preference or no preference. It seems to me that the discovery relating to the underlying facts is identical.

MR. BRILLIANT: Your Honor, you know, having this lawsuit hanging out -- you know, hanging out there obviously is not a good thing for -- you know, for any party. It is a -- it does involve a lot of money. The issues of the state law, you know, claims are much more narrow. The issue with respect to the actual fraud and the fraudulent conveyance complaints, you know, go to some extent as to the -- you know, the knowledge of what was going on at JPMorgan chasing

down former officers and, you know, potentially, you know, directors of the -- of JPMorgan -- I mean, I'm sorry, Lehman Brothers around -- you know, around the world. That's an expensive, you know, difficult undertaking.

The other claims that are here, Your Honor, you know are the fraud claim by Tschira which, again, I would submit to you there's no allegation, you know, that -- you know, that -- in this complaint that would show that there was any, you know, misrepresentation here, you know, that -- you know, to allow that claim to go forward. You know, the only allegation is that, you know, at the time they entered into the contract they didn't intend to comply with it as a matter of law, under New York law. That just doesn't state, you know, a cause of action.

And then there's unjust enrichment and there's, you know, constructive trust. Constructive trust, you know, the only issue there, Your Honor, or one of the main issues is whether or not there was any kind of fiduciary relationship. They don't allege a fiduciary relationship with our client. This is not the -- a situation where we were their -- you know, their clearing bank or their, you know, primary lender.

So, you know, Your Honor, you know, the -- how are we prejudiced, Your Honor? I think is the safe harbor provision is the -- you know, I think the marketplace is

prejudiced, you know, immensely. We're prejudiced by having additional, you know, discovery. It adversely affects, you know, our ability to limit the scope of the discovery and to, you know, have this case resolved, you know, quickly and efficiently.

THE COURT: Are you saying that the marketplace is prejudiced by the procedural setting in which a court resolves a safe harbor defense because if you look at the Quebecor case, for example, that arose in the context of summary judgment. The JPMorgan Chase, which we're talking about a lot, obviously, was on a motion to dismiss.

But does it really matter? Does it really matter whether a court ultimately decides a safe harbor defense, which by the way is a much criticized provision of the Bankruptcy Code because of its breadth of application at the moment. But does it truly matter whether a court decides that as a motion to dismiss or as a subsequently broad dispositive motion following the completion of appropriate discovery?

MR. BRILLIANT: Yes, Your Honor, and it does because I think the expectation is that when there are safe harbors, you know, that as a matter of law, you know, should be granted, the policy is that they should be granted to give, you know, parties comfort that they're not going to have to go through discovery and expense and delay in order

to get rid of the claim.

You know, the Iqbal case, Your Honor, you know, is a case that involves a safe harbor, as Your Honor knows. And Congress, you know, has recognized this by allowing interlocutory appeals with respect to, you know, the denial of safe harbors as a matter, you know, of law in connection with, you know, these types of issues.

And Iqbal, as Your Honor knows, involved, you know, two members of the federal government who claim that they were immune from suit, you know, by a former prisoner who was held in connection with 9/11-related issues. And, you know, it went up on appeal on the motion to dismiss because of, you know, the denial of the immunity, you know, by the Bankruptcy Court.

And the key, you know, issue there, Your Honor, is that the public policy, when you have safe harbor provisions and immunities from suit like this, is to make sure that that's what it is. It's a safe harbor and a immunity from suit, not that you have to go through, you know, delay and costly discovery and the inconvenience associated with that before the application. And that's what the securities industry expects with respect to 546(e).

And, Your Honor, you're right that in some respects there are people out there who criticize, you know, the statute in connection with whether it should be applied

to LBOs and private securities and redemption, you know, of debt, et cetera. But there is no doubt here that this is the type of situation that Congress had in mind when it created, you know, 546. We're dealing with shares of a publicly traded, you know, stock; monies that were transferred from one financial institution, you know, to another; you know, the two banks who received monies as conduits from the Tschiras.

And, also, you know, to the Tschiras who were a financial participant; you know, two entities that had substantial amounts of assets and money invested in the marketplace and, therefore, at a time of crisis like at the time that JPMorgan filed bankruptcy, you know, Congress had decided that they're entitled to certain, you know, protections and immunities.

Your Honor, it would be -- you know, it would be one thing, Your Honor, if there was a real issue here. But, again, you know, leaving aside the issues here, you know, the Madoff exception they claim, you know, that's just -- that just doesn't apply, Your Honor. That's not -- and clearly it's a question of law in this situation, not a factual question.

Then we have the -- you know, the issue of res judicata. Again, legal question.

So then the question is -- like I said, the only

thing that's left is this question of in connection with. And Your Honor, you know, in the JPMorgan case under -- you know, dealt with very similar issues and on a motion to dismiss, you know, dismissed it. There -- as a matter of law these transfers which were made pursuant to an amendment that called -- you know, that made them, the monies independent amounts under the ISDA. You know, given the broad -- you know, even if you had a narrow interpretation of in connection with, it's absolutely clear that it was made in -- as a matter of law that it was made in connection with.

So, Your Honor, it -- there's no fact-finding that needs to be, you know, done for summary judgment. All Your Honor -- by putting this over to summary judgment all you do is encourage parties to come up with, you know, frivolous arguments in order to deny parties entitled to a safe harbor from the safe harbor that they're entitled to, you know, in order to get settlement benefit, which is the exact opposite of what the safe harbor is designed to do.

THE COURT: Well, let me just say the following. Your argument, I think, is absolutely appropriate in a standard safe harbor transaction.

But here as I understand the facts, an amendment was put together literally overnight and literally on the eve of bankruptcy. And the transfers in question were

pursuant to that amendment, which was never signed by your client. You raise questions in your reply papers as to whether that's even a material fact because you've acknowledged the amendment by conduct, or words to that effect.

But unlike the general proposition you've just advanced, there really are facts in question here as to the integrity of the transaction pursuant to which the transfers occurred.

MR. BRILLIANT: Judge, 546 doesn't say that if it occurs the day before the -- you know, the bankruptcy filing that 546(e) or (g) doesn't apply. You know, the opposite. And Your Honor made that very clear in your two, you know, previous rulings. There's no temporal requirement here as to when it occurred.

THE COURT: No. But what I'm --

MR. BRILLIANT: That's --

THE COURT: -- raising is that there are facts relating to the amendment itself, how it came into being, whether or not it is a legally binding and enforceable document that are at issue here, it seems to me.

MR. BRILLIANT: Your Honor, they are not. They are not. The issue today is whether or not this complaint, as a matter of -- you know, as a matter of law, you know, cannot be brought because of the safe harbor complaint. If

you read the complaint, Your Honor, they say the transfers were made in connection with the amendment. It is only in their opposition papers that they say that it may not have been binding.

But the question, Your Honor, is whether or not the complaint states a cause of action. Now, Your Honor, if you want to dismiss the complaint and give them an opportunity, you know, to amend it and have them change it, they will be subject to, you know, Rule 11 if it turns out that they make allegations that are inappropriate.

But the issue is whether or not these transfers were in connection with securities contracts, swap agreements, and the answer is, Your Honor, that they clearly were. Whether the contract was binding and valid isn't the point. The question is, as a matter of law was it related to these agreements. Clearly it was, whether the agreement was binding or not.

But whether it's binding or not is also not relevant, Your Honor, because they say in their complaint that the transfers were made in connection with the amendments. They can't amend their complaint as part of their response for -- you know, from a motion to dismiss.

Your Honor, you're -- you're letting the smoke and the cloud that they're trying to create here get in the way of an analysis of the complaint. And when you read the

complaint there is no interpretation of this that you can have from the complaint that the transfers weren't in connection with the -- or related to the securities contracts.

The other thing, you know, Your Honor, is they don't dispute the fact that the payments were margin payments or settlement payments, you know, as well. They -- you know, the -- it's -- what they're trying to do, Your Honor, in their complaint is move -- you know, ignore what they've already said, which is what we're here to discuss, whether -- and try to create a new set of reality.

And Your Honor should not allow them to do that. And Your Honor also should not bring into, you know, this analysis your own concerns as to why this happened based on other things. All that matters is what does their complaint allege and the complaint doesn't allege anything with respect to that that's relevant.

Your Honor, I would like to move on and talk about some of the other causes of action. Do you want to discuss more on the safe harbor or --

THE COURT: No.

MR. BRILLIANT: No.

THE COURT: I don't want to talk about the safe harbors anymore, but I do have some concern as to how much time we're taking.

MR. BRILLIANT: Okay.

THE COURT: It -- how much more time do you have in your principal argument?

MR. BRILLIANT: Probably another 15 minutes, Your Honor, at the most.

THE COURT: Okay.

MR. BRILLIANT: All right, Your Honor. So let's talk about the question of actual, you know, intent to defraud.

You know, the complaint, Your Honor, under any standard doesn't meet the test here. They do not allege that the Tschira entities were insiders. They do not allege that they had any kind of special relationship with the company. They do not allege that they somehow had any kind of leverage or other ability to adversely affect or to coerce LBHI or LBF into taking any, you know, in appropriate actions. They don't allege any motive as to why it would be that LBHI would, you know, make transfers with actual intent to enter delay or defraud creditors to the Tschira entities.

The other thing is that the transfer was a transfer of collateral, so it wasn't as if, you know, they were transferring, you know, money outside of the estate that could not be recovered at least to LBF pursuant to the contract if it turned out that the Tschira entities were over secured.

Your Honor, with respect to the point in time of the transactions, there was billions of dollars of SAP shares that were being held by LBIE, and under the terms of the agreement if the company didn't file bankruptcy then, you know, the funds would have been returned to LBF, you know, in seven days.

Your Honor, there's -- these are just not the type of facts, you know, that lead a court to, you know, conclude that this was -- that there was actual, you know, intent to defraud. This case is not that dissimilar to the Market XT decision that Judge Gropper wrote. And I quote from, you know, page 396, you know, because here basically what they're saying is our -- is that the Tschira entities insisted on having additional collateral that they weren't entitled to. And Judge Gropper said:

"There is little or no support for the proposition that a creditor's insistence on its right to payment constitutes a prima facie scheme to hinder or delay other creditors with -- in the meaning of the fraudulent conveyance laws. In any event, intent of the transferee is imputed to the transferer only when the transferee is in a position to control the debtor's disposition."

And then Judge -- I'm going to skip a little bit, but then Judge Gropper goes on to look at the badges of fraud and see whether or not, you know, you can infer actual

intent based on badges of fraud. And he says:

"The badges of fraud on which plaintiffs rely demonstrate, you know, the parties' actual fraudulent intent are also inadequate badges of fraud."

And I'm going to skip a little bit, but then he says:

"Here, there are no familial or personal relationships between the parties. On the contrary, the allegations in the complaint evidence an adversarial or at least an arm's length relationship. Nothing was done in secret. The allegations that the transfers at issue lacked adequate consideration are discussed below in connection with accounts claiming constructive fraud. It is alleged that SoftBank (ph) demanded payment in full in preference to other creditors and engaged in a series of transactions, including the lock up and payoff agreements to obtain payment.

"However, these allegations do not support a claim of intent to defraud. For purposes of the actual fraud cause of action, the complaint fails to allege sufficiently specific facts and support the proposition that the transfers to SoftBank were intentionally fraudulent."

And it's the same thing here, Your Honor. They allege that we asked for the money and that we were entitled to it, and they gave it to us. But they don’t allege

anything more than that to suggest that there was a motive or a relationship, some other inappropriate reason why they would give us, you know, the funds. And consequently, you know, they just don't meet the burden of proof here.

You know, the Ninth Circuit in -- you know, in May in connection with the Fitness Holdings case, which we cited in our brief, you know, reached a similar result in connection with the case that in many respects has some analogous facts as well where they basically say that it's -- when a party conveys a security interest to another party, it's just not actual intent. There's not -- you know, without something more than that, you know, there's just -- it doesn't meet the standard of showing that a plausible claim for -- you know, for actual intent.

The badges of fraud that they point out, Your Honor, really boil down to two things: Lack of adequate consideration, which as we know is the basis of a constructive fraudulent transfer, and then they say the fact that it was done -- you know, it was done quickly and hastily. But that in and of itself, Your Honor, the two of them do not provide for a strong inference of -- you know, of actual intent to defraud.

THE COURT: In haste at a time when the Lehman enterprise was about to fall apart -- we know it did fall apart -- and at a time when your client appeared to be

concerned about its assets in Europe. That's all part of at least this picture.

So the -- it's not quite as benign as you suggest.

MR. BRILLIANT: Well, Your Honor, but, again, our client may have had some concerns and Lehman may have been failing, but the real question is are there sufficient facts to give a strong inference of intent to defraud. And the courts say, you know, in order to have that you need to show some kind of motive, some kind of relationship, some kind of, you know, motive. There's no --

THE COURT: The alleged motive was to prop up the European affiliates at a time when there was concern that LBIE was going to go into a proceeding in the U.K.

And one of the things that makes this more esoteric than your average U.S. bankruptcy case is that to the extent there is motivation here, it is motivation of a European entity, your client, with respect to significant collateral held by a Lehman affiliate in the U.K. with respect to transactions in which LBF is a direct party.

So this is not, at least as I understand it, a garden variety anything.

MR. BRILLIANT: Your Honor, even if you want to (indiscernible) out of the complaint, you know, contentions that this was done in order to prop up LBIE or LBF, which the complaint doesn't say, but even if you were to do that,

that, again, does not infer intent to defraud. It -- it's not just that they -- it has to be some kind of improper motive, Your Honor.

We're not talking about constructive fraud here. We're talking about -- at this point the constructive fraud claims, there's a safe harbor for that. Congress has decided that between, you know, constructive fraud or a fraudulent transfer. In the securities markets it's less important for an equal distribution of creditors and more important to protect systemic risk. And so they created 546(e).

With respect to actual fraud, which is the only exception to the safe harbor provisions, there has to be an improper motive, some kind of actual intent to hinder a delay, to hurt creditors, take money outside. And usually what you have there is either -- you know, which -- like with the JPMorgan case some kind coercion such that an improper motive of a financial institution is imputed to the debtor because they control the debtor or have the ability to harm the debtor in some way that they didn't cede to their demands.

But, you know -- or you have some relationship with some party such that, you know, a transfer to an affiliate, a transfer to a friend, you know, retaining where somebody, you know, transfers something and retains back

some kind of interest.

We don't have that here, Your Honor. There's no allegations in the complaint, you know, that suggest that. The only two badges of fraud that they suggest are that it was done quickly and it was lack of consideration.

And, you know, as Judge Gropper in Market XT says, that's just not enough. You know, obviously constructive -- the constructive fraud deals with lack of reasonably equivalent value. You have to have more for actual, you know, intent.

Your Honor, with respect to the other, you know, common law claims, they claim that, you know, the Tschira entities somehow defrauded Lehman. As I mentioned earlier, you know, that fails for several reasons.

One, they don't plead, you know, under (9)(b) sufficient allegations of fraud. They don't plead what the misrepresentation was, what reliance.

Also, the existence of the contract, you know, undermines that.

To the extent, you know, the contract itself, you know, specifically says that the monies would have been returned to LBF and they acknowledge in their complaint only if there wasn't a bankruptcy filing. So, you know, how -- one could say that, you know, that that's fraud is nonsensical on these facts.

They also, you know, purport to, you know, base their fraud claim on the misrepresentation that they intended not to comply with the contract. You know, as we point out, you know, in our moving papers, you know, intention -- you know, that if you have a contract, the terms of the contract comply. The claim is breach of contract. It's not fraud. Even if you can allege or prove, which I don't think they can do here, but even if they can allege or prove that there was no intention, you know, to comply.

You know, with respect to the constructive trust claim, they don't claim any kind of fiduciary relationship and there's no unjust enrichment, you know, here. You know, as Your Honor knows, and this is why we point it out, you know, there's litigation as to -- between, you know, LBF and the Tschira entities as to who owes who, you know, in connection with the ISDA agreements.

And, ultimately, you know, if it turns out that we were, you know, we're supposed to pay and that's determines by the -- you know, the appropriate court, that will be paid to LBF. So there are just an army of claims.

Now, Your Honor, I understand, you know, from the debtors' perspective, you know, that they look at this and they say, we transferred a hundred million Euros on the eve of bankruptcy. Somehow we should be, you know, entitled to

get that back. There should be some kind of claim. And that somehow it seems unfair that they can't get it back.

But, you know, Your Honor, there's a couple of things going on, you know, here.

One is that the party -- and they say this -- that the party who the transfer was made on behalf of was LBF. And presumably they have a claim against LBF and they've filed that claim and, you know, as part of any settlement they have with LBF that will be taken care of. And that's just the nature of a guarantor. When a guarantor, you know, guarantees debt and it pays, it has a claim, you know, against the original obligor.

So they have whatever they have there.

Now with respect to the transfers that they made in connection with the -- you know, the ISDA agreements, the -- by providing the additional collateral and increasing the independent amount, Congress has just decided that that's just not something, you know, that can be avoided in a bankruptcy case.

And so that is just what -- you know, just the way it is. It's not -- it's just -- you know, it's not -- you know, Congress has made that decision. The statute is very clear. As Your Honor has said, it needs to be, you know, strictly applied on its facts.

So, you know, Your Honor, I understand that given

the safe harbor provisions here, you know, they tried to figure out some way of casting this as actual fraud or some state law type of claim. But the reality is on the facts of this situation, you know, it just doesn't apply.

I understand how Your Honor could say, if I take into account all of these other things that are going on in Switzerland and the U.K., somehow it doesn't seem fair, and if I don't -- if I dismiss this case that somehow that's going to take away, you know, leverage from LBHI in connection with some of these other things.

But, Your Honor, that's not what we're here for today.

THE COURT: That's not what I said nor is it what I think. What I said earlier was that I didn't understand procedurally how your client would be adversely affected by a decision with regard to each of the arguments you make in the motion to dismiss at a later stage of the litigation when everything that you are now asserting can be supported by a credible, factual record.

This is not about negotiating leverage from my perspective. It may be about negotiating leverage from the perspective of LBHI and it may be about that from the perspective of your client which seems to be taking a global approach to the litigation.

Indeed, I will take judicial notice of the fact

that prior to the time that an order was entered disposing of the claims made in this bankruptcy case, Tschira took the position through its then counsel, Skadden Arps, that I, as the bankruptcy judge, then presiding over a claim dispute that was square in the middle of this bankruptcy case, that I should stay those proceedings so that Tschira could proceed to litigate issues in the Swiss courts.

If any party in this case is gaming the world judiciary it is your client. So let's not talk about motivation --

MR. BRILLIANT: Okay.

THE COURT: -- when it comes to procedural moves. Your procedural move is an undisguised attempt to blow out this part of the litigation that is, in relative terms, not the major part of the litigation. And the only reason you're here is that there was a reserved right at the time of dismissal for LBHI to litigate with you here.

If you hadn't withdrawn the claim, there would be no question you would be here, and there would be no question that I would be dealing with safe harbors potentially to your client's disadvantage. So your client made the tactical judgment to leave dodge city. Well, you're in dodge city again, this time with a different advocate.

But don't tell me what I'm thinking when it comes

to relative leverage when I have actual knowledge that your client is not just gaming the process here, but gaming the process in Switzerland and in the U.K. Don't make such suggestions in future arguments, please. You don't know what I'm thinking.

MR. BRILLIANT: I -- you know, I apologize if I implied what you're thinking, Your Honor. But I, you know -- and obviously, you know, for the record I disagree that our clients are gaming the system. It's --

THE COURT: You don't have to disagree with it. I have drawn the conclusion based upon what I've seen in this court that your client is motivated to litigate what it wants to litigate where it prefers. It's that simple and you can't deny that. That's why you're pressing a motion to dismiss.

MR. BRILLIANT: Well, Your Honor, we're pressing the motion to dismiss because we believe it's meritorious.

THE COURT: I understand that's what you believe as counsel, and I'm going to tell you right now I'm not granting it.

You can sit down.

MR. BRILLIANT: Thank you, Your Honor.

MR. TAMBE: Good morning, Your Honor. Jay Tambe for --

THE COURT: We're going to take a five-minute

break.

MR. TAMBE: That's fine, Your Honor.

(Recess taken at 12:02 p.m.; resumed at 12:10 p.m.)

THE CLERK: All rise.

THE COURT: Okay. Let's proceed.

MR. TAMBE: Good afternoon, Your Honor. Jay Tambe from Jones Day for the debtor.

We're largely going to rest on our papers, but I do want to address some of the points raised by Mr. Brilliant in light of the comments the Court has made as well.

The confusion that Your Honor eluded to and that Mr. Brilliant seemed to embrace I don't think actually helps the Tschira entities.

The precise reason that we have talked in our complaint and alleged in our complaint, the existence of these multiple arrangements, the custody agreement which was between LBF, LBIE and the Tschira entities on the one hand and then the swap agreements which were between Tschira and LBF, guaranteed by LBHI on the other hand is because as alleged in our complaint as I've stated in our opposition brief, we believe that this grab for money that occurred on the 11th and 12th of September initiated by the Klaus Tschira entities, it was papered and documented in a way

that was pretextual. There was no good faith bas for that. It was done as a pretext.

What the Klaus Tschira entities were really concerned about was LBIE. They had no exposure to LBF or LBHI.

THE COURT: Can I stop you for a second though?

MR. TAMBE: Yes.

THE COURT: What's the basis for that assertion? What's the basis for the assertion that the documentation is a pretext?

MR. TAMBE: The basis is how that -- is the investigation that we've done, the documents that we have looked at, which suggests that what began -- the conversation or the discussion began with the publication of the LBHI financial statements, which I believe occurred on the 10th of September.

And immediately following that, is when these discussions began, and the demand was made by KTS for 400 million Euros. Not tethered to any exposure under the swap agreement, not tethered to do anything having to do with the custody agreement. It was simply turn over $400 million -- 400 million Euros.

I know the question was, how do you make that happen in such a way that they can hold onto it. It was a pretext of paper in such a way that they could hold on to

this money, which they had absolutely no right to demand under any of the existing agreements.

THE COURT: Well, part of what makes this entire saga difficult to unravel at the motion to dismiss stage, is that the complaint which Tschira challenges, doesn't say everything you're now saying. And the defenses raised by Tschira and your response, expand this seemingly simple dispute between LBHI and Tschira into a global scam.

And you are raising in the context of opposing the motion to dismiss a series of arguments that are not plain from a reading of the complaint itself.

MR. TAMBE: If I could speak to that?

THE COURT: Yes.

MR. TAMBE: We do allege specifically in the complaint the existence of the custody agreement, as well as the swap agreement. We allege specifically in the complaint that there existed under the custody agreement, what we referred to as the free shares. The shares that weren't -- that had deposited with --

THE COURT: Yes.

MR. TAMBE: -- LBIE, that weren't there to bind any obligation of LBF -- of KTS to LBF. They were additional. They were surplusage.

There was no basis for those shares to be held pursuant to either the swap agreement or the custody

agreement. They'd simply been deposited and they were being held. That's what we've alleged, Klaus Tschira was concerned about. Klaus Tschira was concerned about the health of the LBHI empire as a whole, was concerned about the fact, as Mr. Brilliant said, there were billions of dollars of SAB shares deposited and held in custody by LBIE.

Now, for reasons that we don't yet know, and we don't allege in the complaint, they did not get those shares back, or seek to get those shares back from LBIE on the 11th and 12th of December. What they instead did was, contacted LBF and demanded 400 million Euros, and got the 100 million Euros the next day.

We -- and that's why we allege, this is a set of facts that is different from the vast, vast majority of commodity transactions, forward purchase transactions, swap transactions that the estate has confronted.

And as Your Honor fully knows, we take safe harbors very seriously. We have not challenged the application of safe harbors, but billions upon billions of dollars' worth of transfers that took place in the ordinary course that were in connection with and related to those safe harbor transactions. This is a different kettle of fish, Your Honor.

THE COURT: Do you have a theory of your case as to why this 100 million Euro transfer took place at all?

MR. TAMBE: I do. I'm not sure to what extent I can fully share that with you, but I do believe, and we do allege in the complaint, that there was somewhat of a special relationship between the Klaus Tschira entities and LBF, and in particular, certain bankers at LBF. That's what got this done, at a time when, as Your Honor said, it made very little sense, if any, for this quantity of money to be moving out of Lehman Brothers.

THE COURT: To what extent is your actual intent to defraud and your fraud claim dependent upon this special relationship with LBF personnel and personnel of Tschira?

MR. TAMBE: I don't think it has to be. I don't think it has to be based on existence of the special relationship. I think it'll provide a motivation, but there well may be other motivations. Purposes of pleading, and as Your Honor has recognized, that JPM and other cases have recognized, what we confronted on September 15th and thereafter, is all of the folks at LBHI, LBF, LBIE that you could, in the ordinary course of business, sit down and talk to and say, why did you make this transfer. We don't have access to those people anymore.

So what we're going by is what we have in our books and records, what information we can glean from those people that we can speak with, and which is why, the courts have said, and Your Honor has said, you can plead the actual

intent aspect of the fraudulent conveyance claim, by pointing to badges of fraud. And that's what we've pleaded.

We've pleaded a series of batches of fraud, as to why this was different, this was unique, this was rushed, not in the ordinary course, and why that gives us a basis to allege this was done with an actual intent to hinder or delay or defraud other creditors of Lehman.

THE COURT: Okay.

MR. TAMBE: If I could speak about the safe harbor issue.

It's an affirmative defense. It's one they have to make out. We have alleged, again, what we believe are, the elements of a constructive fraudulent conveyance action. I've heard Mr. Brilliant say a couple of times in his argument that in reality what happened was W, Y and Z. That's a factual argument. That's a factual argument.

We have not alleged in the complaint, and in fact, did not know until Mr. Brilliant and KTS appended to their moving papers, the unsigned amendment agreement. And the master agreement is quite clear, the amendment is simply not effective if it is not signed by both parties.

This goes to a couple of places. It goes -- it suggests how quickly and speedily this was done, didn't follow the usual formalities, for a significant amount of money to move on the 12th of September. But it also goes

to, and again, a fact pattern that's probably not been presented in the other cases, which is, what do you do -- you know, in effect, you have a gratuitous transfer. You don't have an enforceable contract tethered to anything for the transfer of this money.

That's a factual question, and that confusion doesn't help them. It hurts them, because they have the burden to make out, at this stage of the proceeding, that the safe harbors must apply and the case should be dismissed on the basis of the safe harbors.

THE COURT: Okay. Mr. Tambe, let me ask you to focus on something. Just before the break, I indicated that I was not inclined to grant the motion to dismiss. That doesn't mean that I believe that you have a clear ability to assert claims that appear to be subject to safe harbor defenses.

My reason for saying that I wasn't inclined to grant the motion actually was foreshadowed not in my culminating remarks, but in my colloquy with Mr. Brilliant, in which I was raising questions, as to the harm, if any, to his client associated with differing disposition of the legal issues raised by the motion to dismiss, until such time as a factual record could be presented that would support summary disposition.

He responded that as a matter of policy, it is

unwise for a court to defer dealing with claims, that as a matter of law, should not be pursued. And if one looks at the JPMorgan motion to dismiss opinion, it's consistent with that.

From your perspective, what are the defenses to the claims asserted by Tschira to be subject to the safe harbors? In other words, what distinguishes your claims that would otherwise appear to be subject to a safe harbor defense from the very same claims that I dismissed at the motion to dismiss stage in JPMorgan?

MR. TAMBE: Right. So a couple of points, I think we alleged in the complaint, we explained it in the opposition brief. First and foremost, we say for the facts that gave rise to this transfer, that the money that was transferred, the 100 million that was transferred was not, in fact, transferred in connection with the swap agreements. That's what the piece of paper that the parties passed between each other purported to be. But that's what makes this a different situation than many other situations, where someone is demanding collateral, or additional protection.

Under an agreement which both sides say, yeah, that's what it was there for. We're challenging the very heart, the very formation of that agreement, that's one.

Two, we now know that agreement really never came into being, as a matter of the ISDA master agreement itself,

the unsigned amendment, it's annulity. It's nothing. So now you have money moving, not pursuant to even an amendment agreement, it's just moving gratuitously, which is why we made that comment in the opposition papers.

Third we'd say, and we have raised this issue, and it's a legal issue, and arguably Your Honor could decide it now or wait for the factual development which is, what is the claim preclusive effect of the fact of which these same share entities were before Your Honor on their affirmative claims, withdrew those claims, and whatever else -- whatever other effects that might have, we know that that's res judicata as between LBHI and the KTS entities, with respect to claims that were litigated or could have been litigated in that setting.

And so that's an additional reason, we'd say that's another reason why we have defenses to the safe harbors of interest.

THE COURT: Okay. In reference to that claim proceeding --

MR. TAMBE: Uh-huh.

THE COURT: -- one of the things that occurs to me, and I would simply like your clarification on this, is it the issues that are presented by the adversary proceeding now might have been part of the contested claim proceedings relating to the Tschira claims against LBHI which were later

withdrawn.

It is not entirely clear to me, however, as to whether the allegations of the adversary complaint relating to the hundred million Euros, in fact, were part of or could have been part of the original claim objection. Can you clarify that point for me?

MR. TAMBE: If I followed your question, I'll try my best. In the claims, as originally filed, what the share entities sought was, it sought 600 million Euros, which was their valuation as of October 2008.

We had objected and said the right date for valuation is September 15th, 2008.

THE COURT: I recall it.

MR. TAMBE: And one of the issues that came up in -- if we had litigated those issues is, what do we do about the hundred million Euros that had been transferred. We never got to that stage. And arguably, there would've been a discussion at that point in time, and some development factually and in the record of was that -- how do we treat that hundred million. Is it a transfer that should be avoided, is it simply something that LBF and therefore LBHI gets credit for when you do the valuation exercise.

But that's how we would've played -- that's how we could have and would have played into the litigation on the claim, on the contested claims.

THE COURT: Okay. Let's unpack some of these issues --

MR. TAMBE: Okay.

THE COURT: -- just for purposes of clarity. And I realize that Mr. Brilliant and his colleagues from Dechert were not involved on Tschira's behalf at the time. But as he well knows, I clearly remember what happened.

And I just want to be attentive to the relationship, if any, between what took place in respect of the claim objection, and what's occurring now. Not only because it plays into your res judicata argument, but because it actually lays out the timeline of what brings us to court today.

As I understand the facts, Lehman objected to significant claims made by Tschira in the bankruptcy case arising out of the termination of a swap arrangement, which was measured in terms of its termination value by the market value of SAP shares, that materially declined in value between September 15, the date of commencement of LBHI's case, and a certain date in October which was the date when the transaction was replaced by Tschira.

Is that correct so far?

MR. TAMBE: Except for the last five words I believe. I don't believe Klaus Tschira ever replaced the transaction. I think Klaus Tschira chose to value it as of

that October date. That's a very minor --

THE COURT: Okay. What I --

MR. TAMBE: -- correction, but I do want to make sure --

THE COURT: -- generally remember is that there was a dispute, and that's why this is so ironic, a dispute with respect to the proper application of Section 562 of the Bankruptcy Code, relating to a commercially available determinance of value in respect of the transaction.

And it's also my belief and recollection that we argued through George Zimmerman as counsel for Tschira whether or not 562 issues could or could not be applied extraterritorially in Swiss proceedings, we ended up with a very accelerated schedule for trial on the issues presented by the claim objection, in which as I recall, we attempted to develop an expedited discovery and trial schedule that would generally get us to a point of a hearing before the end of September.

Because it was represented to me that there were issues in Switzerland, which were time critical relating to the settlement approved in the Lehman cases here, and also approved in Switzerland. And that Tschira had objected to that settlement in Switzerland.

That's the background that led to one of the strangest hearings that I can recall, in which Tschira

sought to withdraw its claim, and Lehman objected to the withdrawal of the claim unless it had preclusive effect. And indeed we had two forms of order. A simple order relating to the withdrawal of the claim as proposed by then counsel for Tschira, and a fairly lengthy and detailed proposed form of order that you submitted.

In that form of order, you sought absolutely expressed determinations that the dismissal and withdrawal of the claim would have res judicata impact and would resolve any and all matters in dispute. That's what we litigated in the sense that people filed papers, we had a hearing, and ultimately I indicated that I was going to enter a plain vanilla order, and the parties would later have the ability to argue what the effect of the order might be as a matter of law.

Do you disagree with my rendition of at least this timeline to this point?

MR. TAMBE: With immaterial details, I agree with --

THE COURT: Okay.

MR. TAMBE: -- the rendition, Your Honor.

THE COURT: Okay. Given the fact that the order in question that led to the withdrawal of the Tschira claim, was deliberately fashioned to finesse the question of its ultimate preclusive effect, and given the fact that the

litigation claims that you now press as to Tschira were not explicitly the subject of your earlier claim objection, explain to me how, as a matter of law, the order disposing of those claims now precludes Tschira from raising the defenses that have been raised in the motion to dismiss?

MR. TAMBE: In a couple of ways, but let's start with the first concept, which is the fact that the Klaus Tschira entities withdrew their claims against LBHI, that's all that was before Your Honor, that has some res judicata effect as between LBHI and the Tschira entities.

What we had sought by way of our proposed order, because there was the possibility that that order might play some role in a foreign proceeding is some clarity for the benefit of foreign courts, as to what that means. What does it mean in the U.S. system of justice when someone withdraws their claim with prejudice, and what does it mean to be -- to have res judicata effect.

And I believe what we had sought were specific findings, that may or may not have been relevant, and may or may not have been considered and given some weight in some foreign court, on the types of issues that were being litigated there.

What the proposed order did not contemplate, and I think what the order finally entered obviously did not address specifically was, what do you do about claims not

expressly raised, and therefore, not expressly addressed in any of the proceedings. That's really where we are right now because we're not telling you that the claim that we're now pressing was actually raised before. It wasn't.

It might have been if we had proceeded because the hundred million Euros would've become an issue as you looked at valuation and who got what money when, and who should get what claim. We haven't gotten to that stage, but I can tell you right now, it wasn't actually raised. But that's not the standard for res judicata. The standard is, its claims not only litigated and decided, but as to all relevant issues which could have been, but were not raised and litigated in the suit.

And the argument we've made in this proceeding is, amongst the claims that could have been raised, but were not, that could have been raised before, were claims related to whether or not this transfer of 100 million from LBHI to KTS was a voidable transfer.

Now, as an aside, at the point in time all this was going on, we had a standstill agreement with the Klaus Tschira entities entered into shortly before the two year anniversary of the Lehman filing, similar to agreements we entered into with a lot of other recipients of transfers, where we said, look, a transfer had been made to you, we're coming up on the two year anniversary, give us some time to

figure out what we're going to do with this, let's enter into a tolling agreement. And we have a tolling agreement.

It was only after we terminated that tolling agreement, that we free after 30 days to commence this proceeding. But it was not raised before.

And so I'm not going to suggest that it was expressly contemplated by the order you entered, nor am I going to say to Your Honor that we expressly provided for that in the long form order that we proposed to the Court. What we are relying on is that body of res judicata law and jurisprudence that says, it's res judicata, not just with respect to issues actually litigated, but that could have been litigated.

And certainly if you look at the facts that were cited by the parties in the pleadings that were filed, the hundred million featured in that, that was part of the factual recitation of how we got to where we got to.

THE COURT: Okay. Now, recognizing that I'm not inclined to decide this issue today, if you were to prevail in arguing that res judicata applies, what would the consequence be to the 546 safe harbor arguments? Because it seems to me, and this is just a theoretical conversation we're having, that res judicata cannot nullify congressional policy expressed in the safe harbors.

I mean, in effect, an immune transaction if, in

fact, it's an immune transaction remains an immune transaction.

MR. TAMBE: If we're talking theoretical --

THE COURT: We're talking theoretical.

MR. TAMBE: -- let me suggest a response. The safe harbors exist, but they don't -- they're not automatically self-enforceable. You have to invoke the safe harbor, and I believe the case law suggests that burden of demonstrating the applicability of the safe harbor rests with the parties seeking to invoke the safe harbor.

That same party, under well accepted Supreme Court precedent and any kind of precedent, can waive and be estopped from asserting rights that it otherwise might have as a matter of legislation or policy.

When they chose to walk away and dismiss the claims with prejudice, not a dismissal without prejudice, a dismissal with prejudice, and we had a very heated discussion and debate about you're dismissing with prejudice, folks, and this is going to have some impact, it's going to have some res judicata impact, and they were perfectly prepared to accept that consequence. I don't think that's in conflict with any congressional policy or congressional intent. It's their right to invoke, it's their right to raise. They walked away from all rights, and under res judicata principles agreed to be bound on all

claims that were litigated or could have been litigated.

I think that's their right to give up and they gave it up.

THE COURT: Okay. Well, I'm not going to make any judgment in the context of this motion to dismiss as to the applicability of your res judicata argument in the context of this litigation, but I'm not taking that argument away from you. You still have it.

But there is a great deal of irony in all this because it is my belief, and nobody has to agree with it or disagree with it, that part of what was happening from the perspective of Tschira at the time that it elected to withdraw its claims in its bankruptcy case with prejudice, is that it wanted to avoid an adjudication by this court as to the applicability of Section 562 principles to its claim.

And so we have what I was adverting to in my remarks to Mr. Brilliant at the end of the last session, I called it a gaming of the system on a global scale, we have a party that chooses to withdraw from the bankruptcy court, in order to avoid the consequences of one of the safe harbors, who has acknowledged that it is subject to service of process in the bankruptcy court in the context of withdrawing those claims, who now relies upon the safe harbors, in an effort to eliminate at least some of the claims in the complaint.

At least for me, this is an ironic moment.

MR. TAMBE: I fully share that, Your Honor.

THE COURT: Now, that having been said, I believe the strongest arguments made by Tschira, in their motion to dismiss, relate to the safe harbors. So let's turn around again to the distinguishing factors that would blunt the effect of the safe harbors as to your constructive fraudulent conveyance claims, for example.

You are, in effect, telling me that these are not transfers made in connection with securities contracts or forward contracts or any other qualified transaction under the Bankruptcy Code, but rather purported transfers that are made to appear to be consistent with those provisions, that were designed by the parties, in effect, to escape detection when what was really going on was that for purposes completely unrelated to the safe harbors, Tschira was seeking to bolster its position in Europe, relative to LBF and LBIE.

MR. TAMBE: Precisely, that's --

THE COURT: That's your theory.

MR. TAMBE: That's our theory.

THE COURT: Okay.

MR. TAMBE: And that's what we've alleged in the complaint, that's what we argue in the opposition papers. Now, I think it's up to -- it is a different fact pattern in

some respects than what you were facing in JPM. And it's probably a different fact pattern that's presented in the vast majority of other swap related transfers.

THE COURT: Now, here's the problem I'm having.

MR. TAMBE: Uh-huh.

THE COURT: Now, here's the problem I'm having. While I was saying to Mr. Brilliant that I was not inclined to grant the motion to dismiss because of a fact pattern that from the papers appeared to be confusing and complex, what you've just agreed to, in terms of my formulation of what your theory is --

MR. TAMBE: Uh-huh.

THE COURT: -- is not playing from a reading of the complaint, at least I don't think it is. I figured that out as a result of reading pleadings, reading the papers, and today's argument. Can you point to me -- point me to a part of the complaint --

MR. TAMBE: Sure.

THE COURT: -- where you say that this is, in effect, a ruse?

MR. TAMBE: Okay. I think it showed up in two places, because the ruse aspect of it goes not to just whether or not the safe harbors probably should apply, but the ruse factor obviously plays a big role in the actual intent to defraud, that it was all a ruse. So the factual

allegations are all a ruse.

So let's start with the background, which is in paragraphs 12, 13 through 16, which sets out this notion of three assets, and in 16, sets out the concern the defendants have about the viability of not just LBHI, but LBF and LBI.

18 talks about the fact that what they're really concerned about is the viability of LBIE and its ability to perform its obligations under the custody agreement, not the swap agreements that they point to, the custody agreement, with the three assets in there.

We talk about the fact they contact us and demand the money. We then talk about the fact that the way the defendants do it, all right, 21 and 22 says, there's nothing under the existing credit support annex that supports this demand for 400 million Euros or 100 million Euros. 22 days, the way they do it, is they amend the existing credit support annex, to effectively require this threshold amount, which is an independent amount. Which is not tethered to the valuation of anything, it's just a sum of money.

So it is putting into the vehicle this credit support annex amendment. What they really want, which is they want to hold on to a bunch of cash for one week.

So we could have summed that all up and put it into a conclusory paragraph saying, therefore, the sum of all this is, this was just a ruse, but the factual predicate

and the allegations that we base our theory on, there's no -- I don't think there's any confusion as to what our theory is of liability here, are all laid out in the complaint.

THE COURT: Okay. Thank you.

MR. TAMBE: And just on the public policy issue, if Your Honor wants anymore color on that, we do allege in the complaint, and this was discussed between yourself and Mr. Brilliant earlier, the market -- what is the public policy concern here, is that there is some certainty in the markets.

I don't think those public policy concerns and the smooth functioning of the markets, I don't think those public policy concerns are implicated in the least by this set of circumstances with these facts. And again, when you view that in the context of Lehman bankruptcy and the types of transactions where a challenge has been brought, and the vast, vast majority of transactions where no challenge has been brought.

In fact, the safe harbors functioned extremely well through the Lehman bankruptcy. I think that's what the full record is of -- if there are public policy concerns about how this Court and the estate have addressed the public policy implications behind the safe harbors. I think the record is overwhelmingly that the safe harbors have been respected, have given great certainty to the markets.

But when you are faced with a unique and convoluted fact pattern as we are here, I think there's nothing in public policy that says you can't take a harder look in what was really going on. There's nothing in the public policy that says, you must decide that issue on a motion to dismiss where factual questions have been raised, and where there's some lack of clarity as to exactly what was going on.

THE COURT: Can you identify any case in which other than the Madoff case --

MR. TAMBE: Uh-huh.

THE COURT: -- in which a transaction that purports to be governed by a safe harbored transfer --

MR. TAMBE: Uh-huh.

THE COURT: -- is not treated as a safe harbor transfer because it's in effect a ruse or a manipulation of the process designed to take advantage of a provision where it doesn't apply, because in effect, we're recharacterizing the transaction as a safe harbored transaction.

Let me try that a little -- with fewer words. If I understand your theory, it is money transferred for a particular purpose that had nothing to do with the safe harbors, but was nonetheless documented as a safe harbored transaction on its face --

MR. TAMBE: Yeah, sought to be documented as.

THE COURT: -- is there any authority for the proposition that such a transaction wouldn't be safe harbored anyway, other than Madoff?

MR. TAMBE: Yeah, when I think about the ruse fact pattern, I think the Madoff type cases are the only cases that I am aware of. I will note, however, the mere fact that a party asserts the existence of a safe harbor doesn't mean that the issue gets decided at the motion to dismiss level. And Your Honor pointed to the Quebecor case where that issue actually got litigated and decided on a fully developed factual record, and ultimately the safe harbors prevailed there. But it was for the benefit of knowing exactly what was going on with that set of parties and that set of transactions.

But in direct response to your question, I think outside of the Madoff-type, Ponzi-type cases, where the ruse issue comes up I guess most frequently, I'm not aware of other cases where that has been raised to defeat a safe harbor implication.

THE COURT: Okay.

MR. TAMBE: And if after we go back to the office, we locate one or two, we'll be happy to supplement the record.

THE COURT: I can say that I'm generally familiar with most of the safe harbor cases that have ever been

decided and I'm not aware of one.

MR. TAMBE: As I've said before to Your Honor, it might be unprecedented, but it's not unprincipled. It makes sense if you have the right set of facts to take a look at that issue to see if something is being documented as a safe harbored transaction when, in fact, it isn't. Otherwise, the exception would simply swallow the rule.

I would rest on our papers with respect to the common law claims. If the Court has any questions, I'm happy to answer them.

THE COURT: Okay.

MR. TAMBE: Thank you, Your Honor.

THE COURT: Thank you. Mr. Brilliant, do you have anything more?

MR. BRILLIANT: I'll be very brief, Your Honor.

Again for the record, Allan Brilliant on behalf of the Tschira entities. Your Honor, I'm just going to point out a few points. The theory, you know, that Mr. Tambe, you know, described is, you know, their -- you know, their theory is to -- you know, this ruse, isn't contained anywhere, you know, in the complaint.

And, in fact, the key paragraph here, in connection with the transfer is paragraph 20 of the complaint, where it says, "upon information and belief on September 11, 2008, Chemrilander (ph) contacted

representatives of Lehman and requested an additional 3 to 400 million Euros in collateral. Chemrilander was assured that transferring additional collateral to defendants was a top priority and the transfer of collateral would be done as fast as possible."

And, you know, in 21, they go back into this theory that, you know, under the -- you know, the credit support annex, they weren't entitled to it. But nowhere does it say that they sought -- you know, they sought monies, not as collateral for the transactions that existed, but in connection with the three assets. It just doesn't say that in the complaint, and it's not -- it's just not a fair interpretation for them to reach that conclusion.

And if you read the entire complaint, including the sections that Mr. Tambe referred to in his argument, again, none of them, you know, talk about a ruse or that it was documented in a way to be deceptive. And, in fact, as he freely acknowledged to you that the way it was documented, it ultimately is collateral for the securities contracts.

The standard -- the statute talks about in connection with, related to. This clearly is in connection with/related to, and Your Honor is right, there is no precedent for saying that if something was transferred in connection with the securities agreement, or related to a

securities agreement, but there were ulterior purposes, you know, for having it, that somehow it creates a different interpretation.

You know, the other thing I'd point out, Your Honor, is they -- although I'm not going to dispute the fact that they do say that --

THE COURT: I'm just going to break in.

MR. BRILLIANT: Sure.

THE COURT: I remember a case that may actually apply by analogy. In Lehman Brothers versus Bank of America, I concluded that the 362(b)(17) safe harbor did not apply, and that it was a stay violation for Bank of America to have set off certain collateral in an account that had been created to support overdraft exposure with respect to certain securities clearing relationships between Lehman and BofA prepetition.

I found that the 362(b)(17) provision did not apply because there was no connection between that collateral and derivatives transactions. In effect, and I'm just thinking about this on the spot, and will be corrected by anybody who actually reads the code section and my opinion and is able to make reference to it, but my recollection is that that purported connection to a derivative transaction was overridden by the facts.

In that respect, although it's not on all fours,

there is some precedent for the proposition that a safe harbor needs to actually fit the circumstances. And I mention it only for purposes of clarity.

MR. TAMBE: If I may, Your Honor, just on that point.

If you move the proposition from the ruse proposition to does the safe harbor actually fit, we do cite the Calyon and (indiscernible) Home Mortgage case, where say, where we otherwise may not have a safe harbored transaction, there were aspects of that transaction that were not safe harbored.

So determining the parameters of the safe harbor is appropriate, and there is precedent for that.

THE COURT: Okay. And there's the Calpine transaction which deals with certain alleged safe harbored provisions that were actually outside the scope of the safe harbor.

MR. TAMBE: Right.

THE COURT: In the interpretation of the safe harbors, there's all -- there's some subtlety. So it's not a blunt instrument. That having been said -- please proceed.

MR. BRILLIANT: Yeah, no, I think, Your Honor, as I already mentioned, the Calyon decision doesn't -- really isn't analogous. There was an issue there as to servicing

rights and mortgages, and the question was whether or not the stay was lifted to allow, you know, the, you know, the lender, you know, to foreclose on the servicing rights. The Court, you know, Judge Sontchi there, obviously not binding on this court doesn't involve 546(e) said no, the statute only allows the stay to be lifted with respect to, you know, that which is dealt with under the safe harbor.

Here, Your Honor, it's not disputed that the monies were transferred as collateral in connection with the ISDAs. You know, whether they say, you know, they grab money -- the complaint doesn't say this, but whether they want to say in their argument, they grabbed money any place they could, you know, could get the money, you know, to have collateral. But that the reality is, the collateral was transferred as an independent amount under the ISDA agreement, and the credit support annex.

It was collateral for these agreements, and therefore, it doesn't matter whether they had other ulterior motives, you know, for getting the money, which is not what's really, you know, alleged in the complaint. All that matters is that it was transferred as collateral in connection with the securities contract. And Mr. Tambe admitted that in his argument, that it was done that way, but he says it was a ruse.

Well, it doesn't matter whether or not it was a

ruse, that was the only way they could legally use the money was in connection with that transaction. For them to say it's not related to or in connection with a securities contract just doesn't fit in with Your Honor's decisions, and the other decisions from other courts in connection with the safe harbor.

And -- but, Your Honor, what this really comes down to is if they have a theory of their case now, you know, which is very different than their complaint. And, you know, we don't believe that, you know, under Rule 11 they would be able to amend their complaint, you know, in a way to have it, you know, create a, you know, a cause of action.

But Your Honor should dismiss, you know, the complaint and give them an opportunity to replead it if they can. We don't believe that they would -- you know, based on, you know, the actual evidence, that they can claim that this was, you know, a ruse, because it's just not true.

But if you read the complaint, it's very clear that the Tschiras were concerned about the solvency of the company and then they say, you know, in paragraph 18, they were similarly, you know, concerned about the viability of LBI and its ability to, you know, to perform.

And then when you read paragraph 20, which is the, you know, the operative, you know, paragraph here, it's

clear that the -- they do not allege that they took this as a ruse, but instead, took it as collateral for the transactions they had.

The other thing, Your Honor, I want to point out, is that Mr. Tambe says that in the complaint, you know, they have allegations of the special relationship. There are no allegations of a special relationship. The only allegation that's in here and it's not in the general part of the -- you know, the complaint, the only allegation, and it is a -- just a conclusion of law, which Your Honor should not give any effect to, is just that there is a close, you know, relationship in connection with the constructive trust agreement.

Paragraph 99 says that in the context of the close and confidential relationship between defendants and LBF, defendants demanded, and that appears in 20 -- in paragraph 99, which is the last cause of action, I'm sorry, the next to last cause of action, the last one is the fraud cause of action. And the way the complaint is set up, that provision doesn't apply to previous -- any of the previous, you know, paragraphs in the complaint. Each count only, you know, relies upon the -- you know, the counts that come before it.

So there is -- that in and of itself, Your Honor, is just a -- you know, it's just a legal conclusion which Your Honor should not give any effect to. But there is no

allegation anywhere in the complaint that there's a special relationship, a close relationship.

The bottom line is -- Your Honor, is the complaint isn't just well pled. Now, whether they can amend it under their new theory, you know, here to, you know, withstand a motion, you know, to dismiss is very unclear to me. But the reality is, you know, given where we are at this point, you know, in time, their complaint doesn't withstand, you know, scrutiny and needs to be dismissed.

I understand Your Honor's view that if there's -- if you're not going to dismiss it at all, then why should you dismiss, you know, any of the -- the issues with respect to 546(e). And I guess what I would say to you, Your Honor, is that that's just a law. I mean, the fact that, you know, a party, you know, may not be -- you know, maybe -- may not be inconvenienced in any great way by not dismissing, you know, an account that is ripe for dismissal under law, you know, is not really relevant.

The question is just whether or not as a matter of law it states a claim, whether or not as a matter of law, the safe harbors apply. And based upon, you know, the briefs and the argument, it's pretty clear that we've established that, and that they should be dismissed.

THE COURT: Okay. Thank you. Anything more?

MR. TAMBE: Nothing further, Your Honor, thank

you.

THE COURT: Okay. I think what I'm going to suggest is that we take a lunch break and return at 2 o'clock, and I'll provide a bench ruling at that time, and then we'll go into a chambers conference. So I'll see you at 2.

(Recessed at 1:03 p.m.; reconvened at 2:03 p.m.)

THE COURT: Be seated, please. I really have telegraphed my decision with the comments made during the argument. But I'm going to put those comments in context.

This is not an easy motion to dismiss in a couple of respects. First, it looks very much like the JPMorgan case where I granted a motion to dismiss with respect to 546 safe harbored claims, and denied that motion as to the other claims based on actual intent and state law causes of action.

One possible outcome here is to simply replicate that. Another advocated by the Tschira defendants would be to dismiss the entire complaint, as failing to state claims, and give Lehman an opportunity to amend, not only as to the safe harbors, but as to all claims in the complaint.

A third alternative, and the alternative that I'm adopting, is to deny the motion to dismiss without prejudice with the recognition that the legal issues presented here inevitably will be reasserted at a later point in the case

after the completion of discovery or the development of an agreed record to support a dispositive motion.

That third alternative in the present setting is the correct alternative in my judgment. Although for the reasons I have just stated, each of the alternatives noted might be permissible. This complaint is not the clearest for identifying claims against Tschira, but it is clear enough to withstand the current motion.

As I noted in colloquy earlier, I did not fully recognize the theory for overriding the safe harbor defenses until today. The notion of a misuse of the derivative agreements to transfer 100 million Euros was not clear to me from reading the complaint. It was only today that I recognize that the somewhat flexible approach to the pleading adopted by Lehman here, meant to convey the notion that these transfers which appeared to be made in connection with a protected contract were according to Lehman, being made for another purpose.

That theory leads to the rhetorical question so what, and does that really matter. Because if sophisticated parties are making transfers that purport to be in connection with protected financial contracts, that may be all that the law requires.

Every day of the week in every major business center in the world, parties to transactions make decisions

to structure those transactions either as secured loans that would not be subject to safe harbor protection, or as repos that are protected.

Just because the transactional purpose is effectuated by means of a safe harbored transaction, doesn't render the transaction any less subject to the safe harbors. But there is more going on here and it is really for that reason that I have determined for today to deny the motion in all respects, again without prejudice.

As the discussion this morning demonstrates, there is some tension between reviewing the complaint and its allegations and isolation for purposes of a 12(b)(6) analysis, and considering this litigation in the broader context in which it arises.

In the bankruptcy court, as noted during the argument, this litigation was commenced following the withdrawal with prejudice of certain proofs of claim that had been filed against LBHI against the Tschira parties. That withdrawal followed litigation relating to objections to the claim, based upon Section 562 of the Bankruptcy Code.

It is very clear to the Court based upon that experience, that Tschira, for its own reasons, and within its rights, elected to avoid that battle and present its arguments regarding its claims in Switzerland. I do not fault Tschira for doing that.

But this procedural history makes it very difficult for the Court to view this motion to dismiss as anything other than a procedural gambit, a device, a permissible one, but a device designed to cleanly exit the U.S. Bankruptcy Court. That may happen, but not today.

The reason for the delay is that the facts here are simply too convoluted, confusing, and interrelated with other proceedings for me to confidently make rulings on the merits of the motion today.

As I read the papers, I became increasingly convinced that the relationships between and among Tschira on the one hand and various Lehman affiliates on the other, are so complex that they cannot be fairly understood and characterized without the benefit of facts. Facts that go beyond simply assuming the truth of the facts alleged in the complaint.

For that reason, and in no way being predictive of how the bankruptcy court will rule on these legal issues when next they are presented, I'm denying the motion to dismiss without prejudice. And note, that if the parties proceed through discovery and determine that the complaint lacks the specificity needed to truly state the necessary causes of action that are established by such discovery, the parties may take appropriate action at that time, either by agreement, by means of a final pretrial order, or by

appropriate motion practice in which Lehman seeks to amend its pleadings.

Moreover, mere formulas in here doesn't really count. Tschira, in light of its active involvement in litigation in Switzerland and in the United Kingdom, certainly understands these transactions very well, and has an intimate knowledge of the circumstances. In that respect, any deficiency in the complaint is not a source of current prejudice.

For the reasons stated, the motion is denied, and I'll accept an appropriate order, and we will convert this afternoon's proceeding into a status conference that at the request of at least Lehman, is off the record, and to that extent, I would ask that those parties who should be excused from a chambers conference leave the courtroom, and if everybody who is here is actually a person who would be present during a chambers conference, that's fine too.

(Proceedings concluded at 2:20 PM)

* * * * *

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Sherri L. Breach, CERT*D-397, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sherri L Breach

Digitally signed by Sherri L Breach
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SHERRI L. BREACH
AAERT Certified Electronic Reporter & Transcriber
CERT*D-397

I, Sheila G. Orms, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Dated: December 20, 2013

Sheila Orms

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Date: December 20, 2013